A TREATISE

ON THE

MEASURE OF DAMAGES;

OR,

AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE.

BY

THEODORE SEDGWICK,

AUTHOR OF "A TREATISE ON STATUTORY AND CONSTITUTIONAL LAW."

Cum pro *eo quod interest* dubitationes antiquæ in infinitum productæ sint, melius nobis visum est, hujusmodi prolixitatem, prout possibile est, in angustum coarctare.

Cod. De sent. quæ pro eo quod int. prof. lib. vii, tit. xlvii.

EIGHTH EDITION.

REVISED, REARRANGED, AND ENLARGED

BY

ARTHUR G. SEDGWICK

AND

JOSEPH H. BEALE, JR.

VOL. I

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DANIEL LORD, ESQ.

Dear Sir :

If you find no fault, I am very sure that I shall not be elsewhere censured for placing your name (although without any previous permission) upon the dedication page of this work.

Your opinion of the importance of the subject, is one of the circumstances that have most strongly urged me to proceed with it. But I have other reasons for requesting you to accept this volume.

You show us all, by a teaching far better than barren precept, how much true dignity and usefulness, as well, if we may be allowed to judge, as real happiness, attend a life assiduously, intelligently, and above all, honorably devoted to that profession of which we are the votaries.

I am, dear Sir,
With sincere regard and respect,
Your obedient servant,
THEODORE SEDGWICK

New York, January, 1847.

PREFACE TO EIGHTH EDITION.

THE first edition of this treatise appeared in 1847, in a single volume of six hundred pages, in which some fifteen hundred cases were cited. Failing health prevented the author from continuing the work of revision begun in the second edition, and his death in 1859 made it necessary that it should be taken up by other hands. Several annotated editions were brought out; in these the text was retained intact, and the additions were in the form of new notes, which gradually increased in number and length until they equalled, if they did not exceed, in volume the original work. The annotations sometimes consisted merely in the citations of recent cases, appended to a list of cases already cited, to sustain some proposition of law, sometimes of page after page of criticism upon recent decisions. They were inserted, as such notes must be, where they could be most conveniently introduced; and, as often happens, the result in the course of time was that notes on matters closely connected, or even on the same subject, were scattered through the book under widely separated heads. The result of this was, that while the seventh edition contained additions of very great value—in great measure the work of Messrs. G. Willett Van Nest and William Parkin, of the New York bar—it was often impossible to trace the decisions under a particular head without considerable uncertainty as to whether the search had or had not been exhausted.

Since the author's death there had been no attempt to make the arrangement of the book more systematic. In the preface to the second edition the author said: "For the time being, however, in regard to the order and arrangement of this work, I have felt the full inconvenience resulting from the

present chaotic state of our procedure. I have endeavored to avoid it as far as possible by keeping steadily in view what is manifestly the inevitable result of the experiments now going on, viz., the final and total abrogation of the forms of common-law pleading both in England and America. When that end is at length attained, and when the application for redress shall be made to depend solely on the right, then, and not till then, it will be easy to classify and arrange the rules governing the measure of relief in a manner that shall be at once legal and logical; that shall satisfy the technical demands of the practitioner, and at the same time gratify that love of reason and justice which animates the mind of him who desires to find something in the law besides a mere collection of abstract and arbitrary rules."

The work done in the preparation of the seventh edition made it very clear that the time was rapidly coming when some such revision and rearrangement as the author had in mind when he used this language must of necessity be undertaken. The whole system of common-law pleading, and the great body of common-law forms of action have disappeared both in England and America, while in New York, and the States which have adopted its system of procedure, even more sweeping changes have been introduced.

The effect of these alterations upon the law of damages has been to make it less difficult than it was originally to treat the whole subject in a systematic way. It no longer makes the difference that it once did whether the suit is brought in trover or in trespass, in assumpsit or in debt. In the language of the author, redress is now made as far as possible to "depend solely on the right," and not upon the form in which it is applied for. It is consequently more easy now to state those general principles which underlie the whole law of damages, irrespective of the method of procedure, than it was in the lifetime of the author, and in the present edition the editors have attempted to do this.

At the same time, it would be a great mistake to suppose, as critics of the old system often do, that any system of procedure has swept away all the distinctions of the common law. The Code of New York, for instance, endeavors to treat as non-existent the difference between tort and contract; but no legislature has succeeded in making the same rules of redress govern the two

classes of cases. Motive is still a matter of prime importance in tort, and an inquiry into it is still rigidly excluded in contract. A breach of contract is still a violation of a promise to do something, or to refrain from doing something. A tort is still a breach of a general duty imposed by the law. The law of redress in cases growing out of the breach of covenants in deeds is something very different from the law governing covenants affecting personal property. The damages for failure to make a good title are still in most jurisdictions governed by peculiar rules. An action on a penal bond is not governed by the same rules as an ordinary action of contract. Efforts at a purely logical arrangement of this, as of any other branch of the law, are hampered by limitations handed down to us by preceding generations, which impose a certain order often different from that suggested by a systematic view of the subject.

Another difficulty with which the present editors have had to contend was this: Any rearrangement of the subject involved a rearrangement of the text. The text was left (as appears from what has already been said) by the author in a condition which he foresaw would require rearrangement, and, moreover, some parts of it had become obsolete. Points which, in his lifetime, were still unsettled, had been decided; positions taken by him had been so thoroughly sustained by the courts as to make their statement at length unnecessary. In one or two cases the point under discussion had been settled adversely to the author's view. On the other hand, the book had become a work of authority, its language had been followed by the courts, and it was felt to be improper to change or attempt to improve upon it.

In this embarrassment, the course adopted was one which, it is hoped, will commend itself to the profession. The subject was rearranged in a way which seemed most in harmony with the views of the author—the general principles running through the whole subject, illustrations of which are to be met with in every class of cases, being put first, these being followed by the rules in that great division of the subject which seemed most simple—torts. Contracts are next discussed, as involving more complex considerations, and these are followed by real property, as requiring for its complete comprehension a full understanding of all the rest; while statutory damages, pleading, practice, evidence, special damages, and the relations of court and jury, were,

as before, reserved for final chapters. This rearrangement made it impossible to preserve the original paging of the book, and consequently wherever the text was retained it was placed between asterisks, so that the reader might see at a glance what is the author's and what is not. In case of doubt, as where a passage from the book had been modified substantially, the present editors have, by omitting asterisks, assumed the responsibility for the change. In the course of this work, it was found that a considerable portion of the book consisted of statements of cases, often leading to no definite conclusion, because the state of the decisions did not admit of any. In such cases asterisks have not always been thought to be necessary. But the reader may feel sure that whenever he finds a passage in asterisks it is the work of the author; if it is not in asterisks, it is either the work of the present editors, or of some of their predecessors, or of both combined, or else is the mere statement of a case.

In order to prepare for the revision, it was necessary to examine all the cases in the seventh edition, in order to see how far they supported the propositions which they were cited to sustain. It was found that in many instances cases had been erroneously cited in support of a wrong passage in the text; in others, they did not touch upon the measure of damages at all. This work of pointing out the errors of citation was done in great measure by Mr. Eliot Norton, of the New York bar, a grandson of the author. By this means a great many cases were found to be out of place, and it was ascertained that a great many others must be omitted altogether.

The accumulation of cases for the new edition proved to be very great, and in 1889 Mr. W. H. Wigmore, of the Boston bar, who had begun the work of rearrangement, was compelled to abandon it. His suggestions, however, have proved of value to the present editors. The amount of labor which the preparation of this edition has involved can with difficulty be estimated. When we say that what we had originally hoped to put into two volumes has expanded into three, and that each editor has spent more than an entire year in the work of collecting cases or in writing, and that in addition to this it has required five months to see the book through the press, and that the book is one-half as large again as in the last edition, containing forty-four chapters instead of twenty-six, while the cases cited have increased, allowing for the large number omitted, in perhaps

greater proportion, it will be seen that no pains have been spared to make this edition a thorough revision.

In writing the new text, in which are incorporated most of the notes of the last edition, it was found that the growth of the law in different fields was very unequal, and, of course, most attention has been given to those in which there has been the greatest accumulation of new cases. In real property, for instance, the somewhat rigid rules of compensation have not undergone much modification, and in the common kinds of actions of tort there is no great growth. On the other hand, if we examine the subject of contracts we shall find a continual change and development. Since the last edition, the courts have adopted a tolerably uniform view of the rules in Hadley *v.* Baxendale, while they have greatly developed the law relating to contracts for the carriage of passengers and to telegraphs. The doctrine of avoidable consequences, originally of such slight importance as to need little more than a bare mention, has been so expanded and applied in so many different classes of cases as to require very full treatment. Among the general chapters, the question of the limits of compensation, which lies at the root of the whole subject, is almost entirely new. This embraces matters heretofore scattered through the book under different heads, and it is hoped is one of the chapters which will prove the value of the system of arrangement adopted in the present edition. In the same way, so far as possible, everything relating to interest and to exemplary damages has been put together. The subject of certainty is one of great importance, the courts having devoted much time of recent years to examining and defining the difference between the measure of damages and the methods, nature, and limitations of proof of damage. The chapter on this subject also may be said to be almost wholly new. Again, in the third volume, the subject of statutory damages has been expanded from one chapter into seven. In the chapters dealing with statutes of eminent domain, the attempt has been made to explain the general principles of decision, and for this purpose many extracts have been made from the decisions, where clearness seemed to require it.

The courts of this country for a long time decided all questions relating to the appropriation of private property for public use, under the influence of the rule that where the owner was not absolutely divested of his title, however much he might be

damaged, he was without redress. The author directed attention to the superior protection to private rights afforded by the English statutes. Since his death his remarks have been justified by the adoption in the courts, in certain cases, of more liberal rules, and by the introduction in many States of new constitutional provisions. The effect of this has been to make the American approach more nearly to the English view, and to make the English cases important as authorities in many States. A separate chapter has accordingly been devoted to them, which it is hoped may prove of value.

The general plan of the work, as it at present stands, is as follows: In the first volume are given the general principles which govern the rules of compensation in all cases. The second volume embraces all the particular classes of personal actions and actions relating to personal property, whether sounding in contract or tort. The third treats of real property, recoupment, statutory damages, pleading, practice, evidence, special damages, and the relations of court and jury. The author's notes, so far as possible, have been retained.

It should be said, in conclusion, that the edition is the result of the joint labors of both editors. The book has been gone over by them, line by line and case by case, and the conclusions reached and criticisms made have been the result of a careful comparison of views. They have felt throughout that their attempt, in the light of the great success attained by the author, was a somewhat hazardous experiment; but they have at least done their utmost to preserve the integrity of his work while revising it, as nearly as may be, as they believe he would have done had he survived to carry out his plan. They have tried also as far as possible to follow in the footsteps of the courts as well as the author, and state the result of the cases, rather than to anticipate the course of decision. They have also endeavored to make the collection of cases very full. They have not attempted to cite every case that has been decided on the subject of damages; to have done so would have overloaded the book with a mass of unimportant decisions which are mere repetitions of one another.

A. G. Sedgwick.
Joseph H. Beale, Jr.

New York, May 1, 1891.

PREFACE TO FIRST EDITION.

THE subject of damages, in other words, the pecuniary compensation awarded by the tribunals of justice, in the widest acceptation of the term, embraces the whole field of redress by legal means; and in this sense includes the entire philosophy of the Law, at least so far as it is distinguished from Equity. In taking this view of the matter, we should be led to consider questions which lie at the very basis of our system of jurisprudence—to what extent compensation ought on principle to be carried—whether full and complete remuneration should be provided for every case of civil injury; or whether, as now, the reparation should be confined within much narrower limits. Again, for what particular wrongs reparation should be provided; should the crime of seduction be punished by a civil action on a fiction of service? Should the injured husband have compensation in an action for criminal conversation? In what cases should redress be furnished for slanderous or libellous publications? Ought the malicious refusal to fulfil contracts for the mere payment of money be more severely punished than honest incapacity?

These and similar inquiries would, as I say, embrace the whole philosophy of legal relief. But I have by no means in this volume intended to occupy ground so extensive; my aim has been much humbler; and if not more useful, at least more practical.

My purpose has been to examine those cases only, where, a wrong having been done, or, in more technical language, a right of action existing, the question remains, What is the amount of compensation to be awarded? In other words, what is the rule or measure of damages in courts of law?

In doing this, my principal purpose has been to present the

law as it is; while, at the same time, I have thought it my duty to exhibit the contradictions and discrepancies which exist in this, as indeed in almost every part of our jurisprudence; and which must exist so long as those changes take place in the administration of justice, which sometimes furnish a theme for well-grounded censure, but more frequently exhibit its capacity of self-adaptation to the perpetual fluctuations of our social and commercial conditions.

In the execution of the work, I may be thought to have given the decisions of the courts too much at large. It is not unadvisedly that I have adopted the course pursued in this volume. Our law is so truly to be found in our reports, that it seems to me always better to give the very words of judicial opinions than to attempt to put them in different language. In regard to the subject of damages, too, this course has seemed to me particularly expedient. It is in the course of a trial that questions of this class generally present themselves, and my object has been to make a work which should be practically useful at nisi prius; while, at the same time, I have endeavored to clear the way to a correct appreciation of the whole subject.

I have found another reason for this course in the unsettled state of this branch of the law. The contradictions are so numerous, the discrepancies so great, and the subject in a connected shape so new, that I have hesitated to affirm any position without citing my authority at large. And in collating the decisions, I have found so much variance of opinion in the numerous tribunals which follow the course of the common law that it is with great difficulty in many cases that I have been able to do more than state the doubts as they exist.

I do not by any means flatter myself with the hope of complete success. But if this volume tend in any degree to reduce to greater certainty this department of our jurisprudence—to stimulate the inquiries, or to abridge the toil of those who painfully devote themselves to the great science of justice—my labor will be abundantly repaid.

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A TREATISE

ON THE

MEASURE OF DAMAGES.

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GENERAL VIEW OF THE SUBJECT.

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4. Difference between them.
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General Introduction.

§ 1. The subject a branch of the law of redress.—* The subjects of legal investigation, when practically consid-

ered, generally resolve themselves into three great heads of inquiry: the right of the parties or the cause of action, the forms of proceeding, and the mode of relief. It is of the last only of these three divisions that these pages are intended to treat; nor are they intended to discuss the whole topic of redress; on the contrary, they will be confined to a single head of this extensive branch.

The student of English jurisprudence can never master the subject of which we are about to write, nor, indeed, scarcely any other of our complicated science, until he has completely familiarized himself with the fundamental division and distinction between LAW and EQUITY. There is, indeed, nothing more curious in legal science, hardly anything more interesting in the history of the human mind, than to trace the processes by which the twofold fabric of English jurisprudence gradually arose. How the COMMON LAW, springing from the ancient usages of the Teutonic stock, at once identified itself with the interests of the great feudal proprietors of the soil, and fashioned their real law; and at the same time called to its aid the Trial by Jury, and thus endeared itself to the popular heart; while, on the other hand, the Civil Law, under the name of EQUITY, emerging from the great wreck of the Roman Empire, claimed for itself a jurisdiction which the cumbrous and artificial processes of its rival could not embrace, and by the mere force of its logical order, scientific analysis, and simple reason, has succeeded in obtaining a hold on the legal organization and science of the world, which bids fair, under one name or another, to end in an almost complete re-establishment of its ancient supremacy. But these are considerations of too general a nature to be here pursued further. Contenting ourselves with a cordial invitation

to the student not to neglect these old mazes of our legal history, we confine our observations to matters of more immediate practical interest.

§ 2. **Legal relief consists of damages.**—The relief afforded by a tribunal may be either preventive or remedial. If remedial, it may again be either specific, or it may consist in the mere award of pecuniary remuneration. The common law, as it exists in England, and as it was introduced into the United States, is generally remedial in character, and its remedies are of a pecuniary description. It has few preventive powers; it can rarely compel the performance of contracts specifically; its relief, for the most part, consists in the award of pecuniary damages. Whether it punishes wrongs, or remunerates for breach of contract, in either case its judgment simply makes compensation, by awarding a certain amount of money by way of damages to the sufferer.[1] The rules which in this matter govern its action, *i. e.*, the amount of compensation awarded by common-law tribunals, or in other words the Measure of Damages, will be the subject of this treatise.

A mere enumeration of the forms of action and proceedings at common law, when we consider them in contradistinction to equitable relief, is sufficient to show that the powers of the former tribunals are almost solely remedial, and confined, with few exceptions, to the infliction of pecuniary damages.

§ 3. **Equitable relief.**—Equity operates by injunction; it restrains the aggressor from the contemplated violation

[1] And all the questions growing out of these subjects are investigated in one and the same proceeding. "It is incident to every common-law complaint of injury and damage, that the existence of the injury and right to compensation and the amount of damage alleged to have been sustained are tried and decided in one proceeding and upon one trial." East and West India D. & B. J. Ry. Co. *v.* Gattke, 3 McN. & G. 155, 170; 15 Jur. 261.

of right; it gives specific relief by decreeing the very thing to be done which was agreed to be done; it compels the unwilling party to give testimony; it executes trusts, expounds testaments, and adapts its plastic hand with ease to the varied wants and complaints of man in a state of society. But, as a general rule, it refrains from awarding pecuniary reparation for damage sustained.[1] **

Modern legislation in England ([a]) provides that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any contract, covenant, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any contract, covenant, or agreement, it shall be lawful for the same court, if it think fit, to award damages to the party injured, either in addition to or substitution for such injunction or specific performance, and that such damages may be assessed by a jury, or before the court itself, as it shall think fit. ([b]) But under this act, it was held by Wood, V. C., that the court will not award damages in addition to a decree for specific performance where it does not appear that the plaintiff has sustained any special injury. ([c]) Nor, after making a decree for specific performance, can it add an order assessing damages for the breach of the covenant. ([d]) Nor can it award the damages unless there is an agreement capable of being specifically per-

[1] It is true that a court of equity will sometimes give damages in lieu of the specific performance of a contract, but that is only, as a general rule, where it has obtained jurisdiction of the cause on other grounds. Wiswall *v.* M'Gown, 2 Barb. 270.

([a]) 21 and 22 Vict., c. 27 (Sir Hugh Cairns' Act).

([b]) See Durell *v.* Pritchard, L. R. 1 Ch. 244.

([c]) Chinnock *v.* Marchioness of Ely, 2 H. & M. 220.

([d]) Corporation of Hythe *v.* East, L. R. 1 Eq. 620.

formed. (a) In cases where, under this statute, the court, instead of granting an injunction against interference with the complainant's right, may give compensation, the compensation is given once for all; it cannot be given, as in an action at law, *toties quoties*. (b) It is questionable whether, even under the new codes of practice in the American States, comprehensive as they are, such a jurisdiction could be exercised as that conferred by this English legislation. (c)

§ 4. **Difference between them.**—*With the common law the case is very different. The end at which it arrives is, in almost all instances, one and the same; in the actions founded upon contract, account, assumpsit, covenant, debt, the only object of the plaintiff is to obtain, and the only power of the court is to make, a judgment awarding a certain amount of money, by way of redress for the breach of the agreement. In the case of an action brought for the breach of a contract for the payment of money only, a suit for damages does, indeed, as Lord Mansfield has observed,[1] from the nature of the case, become a *suit for specific performance*. (d) But

[1] Robinson *v.* Bland, 2 Burr. 1077, 1086. "Where *assumpsit* proceeds on a demand of money, it is in truth and substance, and so taken to be in some of the cases, a more special action of debt: for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered *damages;* it is the specific debt, and the jury give the specific thing demanded." Lord Loughborough, in Rudder *v.* Price, 1 H. Bl. 547, 554.

(a) Lewers *v.* Earl of Shaftesbury, L. R. 2 Eq. 270; Ferguson *v.* Wilson, L. R. 2 Ch. 77.

(b) Stokes *v.* The City Offices Co., 13 L. T. R. 81.

(c) See Troy *v.* Clarke, 30 Cal. 419. Where courts of equity exercise jurisdiction to assess damages, as in the case of a wrongful taking and detention of property, they will give neither vindictive nor speculative damages, but compensation only. Sanders *v.* Anderson, 10 Rich. Eq. 232.

(d) Yet, even in this case, the true theory of the recovery on a money demand is "not that the party recovers the particular note or chose in action, as is commonly imagined, but that he recovers damages for the non-perform-

this is almost the only instance where a suit at law compels the very thing to be done which the defendant agreed to do. In the actions of tort, case and trespass, trover, replevin and detinue, the rule is the same, with the exception that in the two latter the law makes a feeble and partial attempt to enforce the return of the specific chattels, for the taking or detention of which the suit is brought.

To this general rule, however, there are some further exceptions, which must be borne in mind. In the action of ejectment, and in the proceedings to recover dower, as well as in cases of nuisance by abating the grievance complained of, the common law gives a specific remedy. By the proceedings of quo warranto, mandamus, and prohibition, and the ancient and now obsolete writ of *estrepement*, and the great writ of habeas corpus also, these tribunals exercise powers very analogous to those of a court of equity. But of these, so far as they belong to our subject, more particularly hereafter.

§ 5. **Damages a species of property.**—Blackstone, in his
53. Commentaries, ranks damages among that "species of property that is acquired and lost by suit and judgment at law." "The primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction."

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ance of the contract." Guy *v.* Franklin, 5 Cal. 416. If any other provision is contained in the contract, there is no specific performance, in a court having only common law powers, as to that. For instance, where in a suit on a note promising to pay $300, "without the benefit of the stay of execution," judgment was rendered that the plaintiff recover, etc., and that the defendant have no stay of execution. It was held, on appeal, that the court could not enforce the specific performance of the agreement, but could only award damages for the breach of it, and that the part of the judgment prohibiting stay of execution must therefore be reversed. McLane *v.* Elmer, 4 Ind. 239.

"The injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and the judgment of the court thereupon, do not, in this case, so properly vest a new title in him, as fix and ascertain the old one. They do not give, but define the right."[1] In Robert Pilfold's case, it is said,[2] "It is to be known that this word *Damna* is taken in the law in two several significations, the one properly and generally, the other *relative* and *stricte*. Damna *pro injuria illata*, and *expensæ litis*"—in other words, damages and costs—"for damnum, in its proper and general signification, *dicitur a demendo, cum deminutione res deterior fit.*"[3] It is of the *Damna pro injuria illata*, or of damages as now known by that phrase in opposition to costs, that we are here speaking, and the rules which govern this species of property form the subject of these volumes, under the name of the Measure of Damages.**

§ 6. **General arrangement of the subject.**—The subject will be arranged in the following general order of topics:

1. The origin of damages under the English system, and the tribunals by which they are now imposed.
2. The general principles by which they are regulated.
3. The measure of damages in particular cases.
4. Set-off, recoupment, and mitigation of damages.
5. The rule of damages under special statutes.
6. Pleading, practice, and evidence, as applicable to the subject.

[1] Book ii., ch. 29, p. 438.

[2] 10 Rep. 115.

[3] The origin of the word *Damnum* is thus given by Grotius: *Damnum forte a demendo dictum. Ita Varro, Libro V: Damnum a demptione, cum minus re factum quam quanti constat. Alii magis probant derivare a Græco* δαπανη, *ut sit dapnum, deinde damnum; ut* ὕπνος, *sopnus, somnus. Nec absurde deducas a Græco* δαμνω, *quod est* βιάζω, *aut ex* ζημία, *damia, damnum; ut regia, regnum.*—De Juro Bell. et Pac. lib. ii. cap. 17. The Digest says, *Damnum et damnatio ab ademtione et quasi deminutione patrimonii dicta sunt.*—De Damno Infecto, l. xxxix, tit. 2, § 3.

7. The control exercised by the court over the jury in regard to damages.

History of Damages in our Law.

§ 7. **Our law of damages originated with the Anglo-Saxons.**—*In investigating the origin of our present system of pecuniary compensation, it is not difficult to trace it back to those Anglo-Saxons, whose marked and peculiar character has so deeply impressed itself on every quarter of the globe. Under the civil law, we shall see hereafter that the rights and remedies of the subjects of the imperial government of Rome were carefully protected in regard to the matters of which we now speak. But when that beautiful and elaborate structure shared the fate of its creators, the rules of right sank with it; and the law but slowly emerged from the wreck and chaos of empire. For nearly ten centuries the intellectual progress of Europe was arrested, or retarded; and during that period the earlier processes of civilization had necessarily to be worked out anew.

§ 8. **Damages under Anglo-Saxon jurisprudence.**—English jurisprudence finds its earliest monument in the sixth century, in the laws of Ethelbert, king of Kent; and this code, known as *Leges Æthelbirhti*, illustrates our present subject too curiously to be unnoticed here. In this code we find the attention of the lawgiver confined almost exclusively to wrongs, or, as we should now say, to actions of tort; and the *were*, *weregildum*, or *weregild*, —literally a man's money, or the price of a man—is the earliest award of damages to be found in our jurisprudence. The antiquity of compositions for murder is illustrated by Homer (Iliad Σ., 498,) where, in the description of the shield of Achilles, two disputants are

represented wrangling before the judge for the weregild or price of blood, *εἵνεκα ποινῆς ἀνδρὸς ἀποφθιμένου.*[1]

"The passion of revenge," says Mr. Hallam, "always among the most ungovernable in human nature, acts with such violence upon barbarians that it is utterly beyond the control of their imperfect arrangements of polity. It seems to them no part of the social compact, to sacrifice the privileges which nature has placed in the arm of valor. Gradually, however, these fiercer feelings are blunted, and another passion, hardly less powerful than resentment, is brought to play in a contrary direction. The earlier object of jurisprudence is to establish a fixed atonement for injuries, as much for the preservation of tranquillity as the prevention of crime. Such were the weregilds of the barbaric codes."[2]

§ 9. **Damages in Anglo-Saxon law compensatory.**— "Damages," says Sir Francis Palgrave, "recovered in a civil action for an assault, or any personal injury not being a felonious act, correspond to the Anglo-Saxon *were.* When Alfred enacts that the seduction of the wife of a Twelf hændman, or an Eorl, is to be compensated by payment of one hundred and twenty shillings; of the wife of a Six hændman, by payment of an hundred shillings; and of the wife of a Ceorl, by payment of forty shillings, he does nothing more whatever than fix and declare the amount of the verdict, instead of leaving the assessment of damages, as we do, to the direction of the judge and the discretion of the jury."[3]

[1] Hallam's Middle Ages, vol. i, p. 154, chap. ii, part ii.

[2] Hallam, *ut supra.* "La Composition," says Guizot, "est le premier pas de la législation criminelle, hors du régime de la vengeance personnelle. . . . La composition est une tentative pour substituer un régime légal á la guerre; c'est la faculté donnée à l'offenseur, de se mettre, en payant une certaine somme à l'abri de la vengeance de l'offensé; elle impose à l'offensé l'obligation de renonçer à l'emploi de la force"—*Hist. de la Civilization en France,* tom. i, p. 275 and 276 (Deuxième ed.).

[3] Palgrave's Rise and Progress of the English Commonwealth, vol. i, pp. 205 and 32.

The *were* is not to be confounded with the *wite*, the one answering to our civil damages for personal trespasses,[1] the other to our criminal mulct or fine. It is to both the *were* and the *wite* that Tacitus refers when, speaking of the Germans, he says, "*Sed et levioribus delictis pro modo, pœna; equorum pecorumque numero convicti mulctantur, pars mulctæ regi vel civitati, pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.*"[2]

It is a curious fact that the laws of remote and barbarous periods show the most minute care in fixing the amount of compensation to be recovered by way of damages. We have the laws of twelve Anglo-Saxon monarchs, from the middle of the sixth century to the Norman Conquest. Of these, the earliest, as has been said, are those of Ethelbert, in the latter part of the sixth century; and his application of the *were*, or in other words, his rule of damages, is singularly minute.

"If the hair be plucked, or pulled, let fifty sceattas[3] be paid in compensation. If the scalp be cut to the bone [of the skull] so that the latter appear, let compensation be made by payment of three shillings.

[1] "The *wite* was a penalty paid to the crown by a murderer. The *were* was the fine a murderer had to pay to the family or relatives of the deceased; and the *wite* was the fine paid to the magistrate who presided over the district where the murder was perpetrated. Thus the *wite* was the satisfaction to be rendered to the community for the public wrong which had been committed, as the *were* was to the family for their private injury." — Bosworth's *Anglo-Saxon Dictionary in voc.* Were and Wite.

Dr. Lappenberg, in his History of England under the Anglo-Saxon Kings (see B. Thorpe's translation, London, 1845, vol. i, p. 336, *Particular and Penal Laws*), mentions several other fines imposed, besides the *were* and the *wite*, in cases of homicide. He says, "The relations of the slain received the whole *weregild* annexed to his rank in the community." "Previously to paying the *weregild*, the king's *mund*, a fine to the king for the breach of his protection, was to be levied; after which, within twenty-one days, the *healsfang* (apprehensio colli, collistrigium), a mulct in commutation of the pillory, or some similar punishment, was to be discharged, and after that, within twenty-one days, the *manbot*, or indemnity to the lord of the slain, for the loss of his man. In addition to all these, there was still the *fyht wite*, due to the crown for the breach of the peace, which, as well as the *manbot*, could never be remitted."

[2] De Moribus Germaniæ, c. 12. Palgrave, vol. i, p. 99.

[3] A silver coin, weight 19 gr. *Vide* Hawkins' English Silver Coins, p. 18.

"If an ear be cut off, let compensation be made by payment of twelve shillings.

"If a piece of the ear be cut off, let compensation be made by payment of six shillings.

"Whoever fractures the chin bone, let him forfeit twenty shillings for the offence.

"For each of the front teeth, six shillings.

"For the tooth that stands by the front teeth (on either side), four shillings.

"For every [finger] nail, one shilling.

"If the great toe be cut off, let a fine of ten shillings be incurred.

"If the great toe nail be cut off, let thirty sceattas be paid for compensation. For every other toe nail, ten sceattas."[1]

§ 10. **Anglo-Saxon compensation pecuniary.**—It will be noticed that the *were*, or damages, in the laws of Ethelbert, is assessed in money. But, says Sir Francis Palgrave, "until a metallic currency was introduced, the legal fines and penalties were paid in kind; in the laws of Hoel Dda all such fines are reckoned in cattle, and the same mode of computation prevails in the *Brehon* laws of Ireland, and the '*Assythments for Slauchter*' of the Scots. An intermediate stage is denoted by the laws of the Continental Saxons. Their *weres* are fixed in *solidi*, or shillings. But the *solidus* was an imaginary denomination; and instead of counting down the coin,

[1] The above extract is taken from Sir Francis Palgrave, vol. ii, page cvii. The last Latin translation of the Anglo-Saxon laws was by Wilkins, in 1721. The Record Commission, among its most valuable and important labors in the field of early English jurisprudence, have published, under the direction of Mr. Thorpe, the first English translation of these curious codes. The history of no part of the law should be written without giving them a careful examination.

Besides the folio edition of the Anglo-Saxon laws, published by the Record Commission, there is an edition in two volumes, 8vo; the translation of the passage above is substantially the same as that of Palgrave, with the exception that, in the former, "*Bote*" is used for its equivalent "*compensation*."

the offending party might drive his legal tender into the farm of the plaintiff. An ox passing sixteen months old, represented the greater solidus; the lesser solidus was a yearling ox, or a ewe and her lamb. Amongst some Saxon tribes, the solidus was reckoned in corn; thirty bushels of oats, forty of rye, and sixty of wheat, being each its equivalent; and it is most probable that the necessity of adjusting the ancient fines to the standard of Roman Britain, was the cause which produced the enactment of the Kentish laws."[1] "The coined money in England," says Mr. Sergeant Heywood, speaking of the Saxon period, "was so trifling in quantity, that most of the transactions of commerce, and all buying and selling, were carried on by barter, and cattle obtained the name of *Viva pecunia*, from being received as money upon most occasions, at certain regulated prices."[2]

[1] Palgrave's History, vol. i, p. 44.

[2] The Ranks of the People under the Anglo-Saxon Government, by Samuel Heywood, Sergeant, Introd., p. lii. *In Wera reddere poterit quis*, says the law of the Conqueror, § 10, *equum non castratum pro XX solidis, et taurum pro X solidis, et jumentum pro V solidis.* And see Lex Saxonum, tit. xviii., De Solidis. As to the value of the *Solidus*, Gibbon says, "Till the twelfth century we may support the clear account of twelve *denarii*, or pence, to the *solidus*, or shilling, and twenty *solidi* to the pound weight of silver, about the pound sterling. Our money is diminished to a third, and the French to a fifteenth of this primitive standard."—*Hist. Ch.* 58, note.

The use of cattle as a measure of value is of very great antiquity,—thus Homer:—

> The third b ld game Achilles next demands,
> And calls the wrestlers to the level sands;
> A massy tripod for the victor lies,
> Of twice six oxen, its reputed price;
> And next, the loser's spirits to restore,
> A female captive, valued but at four.
> *Iliad*, book 23, 1815.

It seems probable that money became the general measure of value in England not long after the Norman Conquest.

The old feudal services were all originally rendered in kind; the reliefs in horses and arms—military service in person. But in the reign of Henry II, "the humor of the times being," says Mr. Sullivan, "that everything should be paid in money" (Lectures on the Laws of England, Lect. 31, p. 290). the reliefs were commuted for a specific sum, and personal service was exchanged by the same king for escuage and scutage, and the same thing took place in regard to rents (pp. 288 and 289). See also Heywood on Ranks.

The civilized Romans recognized a metallic currency as the measure of value: *qui non facit quod promisit, in pecuniam numeratum condemnatur, sicut evenit in omnibus faciendi obligationibus.*—L. 13 in f. ff.: de re: judic: and says Domat, vol. I, p. 271; *Des Interéts; L'argent tient lieu de toutes les choses qu'on peut estimer.*—Liv. iii, tit. v, sect. ii, § 16.

The laws of the Saxons, and those of Hoel Dda, both noticed in the above extract from Sir Francis Palgrave, may

§ 11. Amount of compensation carefully defined.—The laws of the Anglo-Saxon monarchs, which we have from

not be without sufficient interest in connection with our present subject to permit a brief note. The date of the *Leges Saxonum et Frisionum* has been the subject of great controversy among the antiquarians (see a Historical Treatise on Trial by Jury, Wager of Law, etc., by Thorl Gudm. Repp, Edinburgh, 1832, p. 23); some ascribing them to Charlemagne, and others to Harold Blue Tooth of Denmark, whose reign closed A.D. 984. The latter opinion would seem the better; in either case, these laws are of interest to the scholar of English jurisprudence, as they at all events belong to the same race from which our ancestors sprang, although after they had left the parent land. Nothing can exceed the simplicity and brevity of these codes:—

In Christi nomine incipit Legis Saxonum, Liber de Vulneribus.

1. De ictu nobilis, solid. XXX, vel si negat, tertia manu juret.

2. Livor et Tumor, LX, solid. vel sexta manu juret.

3. Si sanguinat, cum CXX, solid. vel cum undecim juret.

4. Si os paruerit, CLXXX, solid. vel cum undecim juret.

7. Si per capillos alium comprehenderit CXX, solid. componat vel XII a manu juret.

The two bodies of law, the *Lex Saxonum* and the *Lex Frisionum* may be found at length in the *Codex Legum Antiquarum* of Lindenbrog, a curious collection of the legislation of the Middle Ages.

Hoel, or Howell Dda, Howell the Good, was a King of South Wales in the 10th century; the date of his compilation, which consists of three codes, the Venedotian, Dimetian, and Gwentian, is between 914 and 942, and it appears that laws of a similar character are traceable as far back as the 6th century. The republication of these statutes forms one of the great labors of the Record Commission. These laws exhibit the most minute particularity in the estimation of damages. They speak of various sorts of compensation for,—

I. *Saraad*, or disgrace.

II. *Galanas*, or murder.

And these terms, *saraad* and *galanas*, are also used for the mulct imposed for the offense or crime. There were also two other fines: the *Dirwy* (from Dir, force), a fine of twelve kine, or three pounds; and *Camlwrw*, a fine of three kine, or nine score pence.

The following extracts illustrate this legislation. Venedotian Code, p. 115.

§ 27. In three ways *Saraad* occurs to every person in the world; by striking, assaulting, and taking by violence from him; and if it be a man, if his wife be violated, it is *saraad* to him: if it be a woman, if she find another woman with her husband, it is *saraad* to her; and so nobody escapes without being subject to *saraad*.—

§ 27. The *Galanas* of a steward, a chief of a kindred, a canghellor, and a chief huntsman, is nine score and nine kine, once augmented; and their *saraad* is nine kine and nine score of silver, once augmented.—

P. 108, § 12. A *dirwy* is due for fighting; fighting is assault and battery, and blood and wounds, the three things that constitute fighting; and therefore it is right to pay *dirwy* for them. The amount of the *dirwy* is twelve kine, or three pounds: the amount of a *camlwrw* is three kine, or nine score pence.—

P. 125, § 58. For a dog or for a bird, or for anything of that kind, there is neither *dirwy* nor forfeiture of life; but *camlwrw* to the lord, and amends to the owner of the property.—

P. 137. Of the worth of fowls.

1. A hen is one penny in value.
2. A cock is two hens in value.—

P. 140. Of skins this treats.

1. The skin of an ox is eight pence in value.
2. The skin of a hart, eight pence.

P. 141. Of the worth of trees this treats.

1. The worth of an oak, six score pence.
5. The worth of a knurled oak, on which there is no fruit, four legal pence.

P. 142. Here Iorwerth, the son of Madog, son of Raawd, saw it to be expedient to write the worth of the build-

the period of Ethelbert of Kent to the Norman Conquest, contain all, more or less, the application of the *were;* but in none, with the exception of those of Alfred, between A.D. 871 and 901, do we find the same minute classification of wrongs and remedies which we have just had occasion to notice.

In the laws of Alfred, the rates are higher, whether owing to a better appreciation of personal rights, or to the increase and consequent depreciation of the currency. In the laws of the Conqueror, the *weres* become very few. Perhaps this is evidence of a civilization gradually increasing, and a jurisprudence slowly improving; for feeble certainly, and unreliable, must be the tribunal charged with the task of imposing damages in civil suits, if the legislator considers it unsafe to be trusted with the assessment of the amount. This elaborate and minute specification, therefore, though on its face it appears to indicate the care and watchfulness of the lawgiver, on a closer examination furnishes stronger proof of his distrust of the judiciary. Arbitrary rules, which do not bend to the justice of the particular matter, especially when used to fix values, are always a misfortune and a defect in jurisprudence: they should never be tol-

ings, and the furniture, co-tillage, and corn damage, together with the proof book.—

P. 145. An iron pan, one legal penny. A flail, a farthing.

P. 149. Wadded boots, four legal pence.—

P. 151. Every other thing whatsoever, on which there is no legal worth, *is to be appraised.*—

§ XXIII. Now of the members of the human body.—

P. 157. Of corn damage this treats.—

§ 16. If a horse be found stretching his neck over a hedge, eating the corn, it is not right to take him, but to obtain compensation for damage, unless he be exculpated.

Anomalous Welsh Laws.

P. 708, § 5. Three punishments for ferocious acts; the payment of galanas for the slain; death to him who does the deed; and harrying spoliation of the property of the murderer.

As has been said, these extracts are taken from the *Ancient Laws of Wales*, published in one of the folios of the Record Commission; the valuable labors of that Commission, and their munificent liberality to the literary institutions of this country, cannot be too frequently nor honorably noticed.

erated, unless on account of some peculiar and extraordinary difficulty in arriving at the truth of the individual case.

§ 12. **Anglo-Saxon judiciary.**—What the judiciary was under the Anglo-Saxon government, it is now apparently impossible to learn. Palgrave says,[1] "Some kind of adjudication probably took place amongst the Anglo-Saxons before the *were* could be required." But any inquiry into this matter, even if practicable, would lead us far beyond our proper limits. It may not, however, be foreign to our subject to notice that if the *were* or the *wite* could not be paid, slavery (it seems) was the consequence. "The criminal whose own means were insufficient, and whose relatives or lord would not assist him to make up the legal fine he had incurred, was either compelled to surrender himself to the plaintiff or to some third party, who paid the sum for him by agreement with the injured party. Such a serf was called criminal slave. These are the *servi redemptione* of Henry the First."[2]

§ 13. **Later modes of trial.**—We now come to the examination of the tribunals which, under our present system, are charged with the duty of assessing the amount of damages. Various modes of trial have obtained at different periods of English jurisprudence; trials by ordeal, by battle, by wager of law, and by jury.

§ 14. **Trial by ordeal.**—The trial by ordeal, finally prohibited in the early part of the thirteenth century,[3] was the creature of a superstitious age. It was the offspring of the clergy, and perhaps one among their many efforts to counteract the violence of the military portion of the

[1] Vol. i, p. 205.
[2] The Saxons in England, by J. M. Kemble, 1849, vol. i, p. 197.
[3] Ordeals were prohibited by the 18th Canon of the Fourth Lateran Council, A.D. 1215. Palgrave, vol. i, p. 66.

community. In this aspect, it may not have been without its uses.

§ 15. **By battle.**—The trial by battle was the natural growth of the period at which we find it existing. "Man," says the learned and sagacious writer whom we have already several times quoted, "never begins by introducing any law which is entirely unreasonable; but he very frequently allows a law to degenerate into folly, by obstinately retaining it after it has outlived its use and application."[1] We should naturally expect, in a barbarous and disturbed state of society, where every man's house was a castle, and the whole structure of society upon a martial basis, that questions of right would originally be decided by an appeal to force, and that the first efforts of the legislator and the jurist would only be to systematize and solemnize this mode of determining a controversy by subjecting it to fixed rules, and decreeing the result to determine the right forever.[2] This mode of trial naturally gave way[3] before the advancing spirit of

[1] Palgrave's Rise and Progress, vol. i, p. 229.

[2] Ainsi, says M. Guizot, s'est introduit dans la legislation le combat judiciare, comme une regularization du droit du guerre, une arène limitée ouverte à la vengeance.—Guizot, *Hist. de la Civilization en France*, tom. i, p. 294 (deuxième ed.).

[3] Although singular as it appears, the appeal of death was not abolished in England till 1819. See Ashford *v.* Thornton, 1 B. & Ald. 405, which resulted in an act of Parliament.(a) The reign of Richard II., 1398, saw one famous trial by battle (being an appeal of treason) between two great lords, Hereford and Norfolk; and Shakespeare's genius has fixed it in our literature:

"What my tongue speaks, my right drawn sword may prove."

In France, trials by battle, *le gage de bataille*, were abolished as far as regarded the Royal Domains, by St. Louis (Louis IX.), by his ordinance of the year 1260. He prohibited *les batailles en justice mettant en leur place preuves par temoins, sans ôter les autres bonnes et loyales preuves usitées en cour laique jusqu' à ce temps.* So as to appeals or *faussements de jugements*, as they were called, and which were effected by a challenge to the judge to mortal combat: they were done away by the 8th Article of the same ordinance: *Si aucun veut fausser jugement, en pays là où faussement de jugement affiert, il n'y aura point de bataille; mais les clameurs, les repons, et autres erremens du*

(a) Act 59 Geo. III. ch. 46.

order, and little trace of it appears after the fourteenth century.[1]

§ 16. **By wager of law.**—The wager of law, or trial by compurgators, of which we see constant traces in the Anglo-Saxon laws, and which existed till a very recent period,[2] may claim a more reasonable origin. A party accused of an offence exonerated himself from the charge by the oaths of a certain number of witnesses; and as Palgrave well observes: "In criminal cases the whole theory of this trial resolves itself into the ordinary practice of our modern courts of justice. Evidence has been given by which a presumption is raised against the accused; but not being conclusive, it is rebutted by the proofs of general good character."[3]

§ 17. **By jury.**—Of the four modes of trial of which

plaid seront rapportés en nvtre cour. These provisions were intended to apply only to the Royal Domains, but the influence of the lawyers (*les Legistes*) gradually established the prohibition throughout the kingdom. See Sismondi's Hist. des Francs, tom. viii, ch. xi; Guizot's Hist. de la Civiliz. en France, vol. iv, p. 162 (deuxième ed.); Stephens' Lectures on the Hist. of France, lecture viii, for an interesting and picturesque description of the manner in which the lawyers ousted the barons out of their own courts.

[1] See Sismondi's Precis de l'Histoire de France, vol. i, p. 366, and Guizot's Hist. de la Civilization, vol. iv, p. 162. M. Guizot calls private wars and judicial duels (p. 159), "les deux bases essentiels de la féodalité."

[2] 3 Black. Com. ch. 22, p. 345. In New York, by 2 Revised Statutes, p. 410, part iii, ch. vii, tit. iv, art. 1, § 4, "Trials by battle, and by the grand assize, and all other modes of trial except by a jury or by referees, are forever abolished." Wager of law existed in England till recent times. It was abolished in all cases by 3 and 4 W. 4, ch. 42, sec. 13; Chitty on Pleadings, vol. i, * 128.

[3] Vol. i, p. 233. This analogy applies, however, only to those cases where the evidence is presumptive, and not positive; as in the latter class testimony to character is admitted only in mitigation of the sentence. La véritable origine des *Conjuratores*, says Guizot, c'est que tout autre moyen de constater les faits était à peu près impracticable. Pensez à ce qu'exige une telle recherche, à ce qu'il faut de développement intellectuel et de puissance publique pour la rapprochement et la confrontation des divers genres de preuves, pour recueillir et débattre des témoignages, pour amener seulements les témoins devant les juges, et en obtenir la verité en présence des accusateurs et des accusés. Rien de tout cela n'était possible dans la societé que régissait la loi salique; et ce n'est point par choix ni par aucune combinaison morale, c'est parcequ'on ne savait et ne pouvait mieux faire, qu'on avait recours alors au jugement de Dieu et au serment des parens."—Guizot, *Histoire de la Civilization en France*, vol. i, pp. 284, 285.

we have spoken, then, the one that has survived them all, after undergoing, however, very material modifications in its construction, is the *trial by jury*. But it is not within the scope of our present subject to trace the gradual formation of this institution. Suffice it to say, that trial by jury, originally a trial by witnesses, the jury being themselves the witnesses,[1] gradually supplanted the various modes of trial by battle, ordeal, and wager of law, and from the time of the reign of Henry II., seems to have begun to acquire stability, if not its present form.[2] At all events, at the period of the earliest systematic records of judicial proceedings in England, the jury had become the tribunal which disposed of the question of fact, and the amount of damages became a principal part of their jurisdiction. All hope of discovering the precise date is now, perhaps, lost, as is the case in regard to the epoch of still greater interest, that of the origin of parliamentary representation.[3] It is certain that damages, by their present name, were known at a very early period of the English law. The statute of Gloucester, passed 6 Edward I., A.D. 1278,[4] after giving damages in certain real actions in which they were not previously recoverable, goes on to give costs in the same cases, and closes

[1] "The ancient jurymen were not impanelled to examine into the credibility of the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves, and the verdict was substantially the examination of these witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question to the best of their belief. In its primitive form, a trial by jury was therefore only a trial by witnesses."—Palgrave, vol. i, p. 244.

[2] Palgrave, vol. i, p. 66 and p. 243. See Repp on Ancient Trial by Jury, already cited (§ 10, in notes), an ingenious treatise to illustrate the gradual formation of the jury from the wager of law and the trial by battle. To Sir Francis Palgrave's work great obligations must be acknowledged. Indeed, to the legal student who desires an acquaintance with the origin of our jurisprudence, it is indispensable. Those, also, who desire a philosophical view of the barbaric codes, cannot be better referred than to M. Guizot's Histoire de la Civilization en France, the 9th and 10th lessons of the first volume, and Mr. Hallam's History of Europe during the Middle Ages, vol. i, chap. ii, on the Feudal System.

[3] Turner's Anglo-Saxons, book viii, chap. iv, vol. iii, p. 185, and Appendix III, ch. ix, vol. ii, p. 236.

[4] 6 Edw. I, c. 1.

by enacting that the act shall apply to all cases where the party is to recover damages. "Et tout ceo soit tenu en tout cas ou homme recover damages."[1]

§ 18. **Modern tribunals.**—The jury in its present form dates, as has been already said, from about the period of the reign of Henry II. (1150).[2] Previous to that time, the great mass of business was transacted in the county courts, where the freeholders were judges of both law and fact. The *Aula* or *Curia Regis*, of which the King's Bench is a remnant,[3] disposed of the causes of the great Lords only. The exchequer already existed, but was a part of the *Aula Regis*.[4] It would seem that this freeholders' court became very obnoxious, as ignorant of law, rendering it multiform, unequal, and unjust; and these abuses were remedied by the appointment of justices in eyre, who settled the questions of law, leaving to the jury the questions of fact.[5] The precise origin of this curious division of power, it is, as has been said, now impossible to trace with accuracy. A similar or analogous distinction existed in the republican age of the Roman Law under the procedure by *formula;* but that feature of their jurisprudence disappeared when the formula, together with the office of the *Judex*, or Referee, was abolished, and the magistrates, under the despotic innovations of the Empire, disposed of the entire litigation *extra ordinem.* To this we shall have occasion hereafter to advert; suffice it for the present to say that since the period to which we have referred, the maxim has gener-

[1] See Barrington's Observations on the Statutes, p. 109. "After verdict given of the principal cause, the jury are asked touching *costs and damages*. —Jacob's *Law Dict.* "*Damage.*"

[2] "Although Henry II. was not in strictness the inventor of that legal constitution which succeeded to the Anglo-Saxon policy, yet 'Trial by the Country' owes its stability, if not its origin, to his jurisprudence."—Palgrave, ch. viii, vol. i, p. 243.

[3] Bl. Com. bk. 3, ch. iv, § 6, p. 41.

[4] Hale's History C. Law, ch. vii; Sullivan's Lect. 32, p. 300; Bl. Com. bk. 3, ch. iv, § 6.

[5] Sullivan's Lectures, Lect. 32, p. 296; Hale's Hist. of Com. Law, ch. vii, vol. i, p. 246.

ally held good in the English law, *ad questiones legis respondent judices; ad questiones facti juratores.*

§ 19. **Quantum of damages a question for the jury.**— The quantum of damages being in most cases intimately blended with the questions of fact, must have been from the outset generally left with the jury. It is very certain that the limits of their power over the amount of remuneration were not at first as clearly defined as they have since become. In one case, as late as the reign of James I.,[1] it is said that "the jury are chancellors," and that they can give such damages as "the case requires in equity," as if they had the absolute control of the subject. So an early text-writer puts the case of sheep passing the Severn, and, one of them being forced into the water, all the rest follow and are injured, and asks whether he shall have damages for all or for one; but the only solution he can find for the difficulty is, that the "jury must well consider of it."[2] Yet, on the other hand, the old books are full of cases, where, on judgment by default and even on demurrer, the courts themselves fix the amount of damages;[3] and the remains of this we see in the power still exercised by the English courts in cases of *mayhem.* Indeed, for a long time after the distinction between law and fact was clearly established, and the separate province of judge and jury defined with considerable accuracy, there appears to have been an almost total want of any clear and definite understanding of those rules of damages which we are about to consider.[4]

Before commencing the more practical part of this

[1] Sir Baptist Hixt's case, 2 Rol. Abr. 703, pl. 15.

[2] Shepherd's Epitome, p. 70.

[3] Rolles' Abr. tit. Damages. The court has still power to assess damages on demurrer, or default, without the intervention of a jury. Whitaker *v.* Harrold, 12 Jur. 395.

[4] For a very full and able description of the powers and duties of court and jury under our system, see Commonwealth *v.* Porter, 10 Met. 263, and many cases there cited.

treatise, however, it will be well to bear distinctly in mind the general principle which the English law has in view in this matter, and how in this respect it differs from other systems of jurisprudence. **

Damages under other Systems of Law.

§ 20. **Jewish law.**—* We have seen in the early laws of the Anglo-Saxons, that with the most minute care, specific damages were arbitrarily assessed in each class of cases, without reference to the actual injury sustained in the particular case. We find in codes yet more ancient, rules equally arbitrary in this respect. In the Jewish law (Exodus, ch. xxi, ver. 32) various provisions of a similar nature are incorporated; thus, "If a man's ox push (gore) a man servant or maid servant, he shall give unto their master *thirty shekels of silver*, and the ox shall be stoned." So, again, ch. xxii, ver. 9: "For all manner of trespass, whether it be for ox, or ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn, he shall *pay double* unto his neighbor." So, again, by a rough equity, ch. xxi, ver. 35: "If one man's ox hurt another's that he die, then they shall sell the live ox, and divide the money of it, and the dead ox also shall they divide."

§ 21. **Hindoo law.**—The same principle is to be found in the laws of the Hindoos: "Where a claim is proved, the person who gains the suit is put in possession, and the judge exacts a fine of equal value from the defendant. And if the plaintiff loses his cause, he in the like manner pays double the sum sued for." And in regard to torts the same principle was applied.[1]

[1] Ayeen Akberry, by Gladwin, vol. ii, pp. 498, 504.

§ 22. **Roman law.**—When we come to the Roman law, we find the subject elaborately, but not very clearly nor very harmoniously treated. To understand its provisions, it is necessary to bear in mind the fact to which we have already adverted, that until the despotic centralization of the Empire had completely subverted the early institutions of the Republic, the same line was drawn in their administration of justice, as with us, between questions of law and questions of fact. The magistrate who heard the statements of the parties did not decide the cause. He turned the litigants over to a *judex*, or single juror, or referee, as he may be regarded, giving him at the same time a *formula* or charge by which his decision was to be controlled. This control was, however, not an absolute one, and in some aspects of the cause, and particularly as to the extent of the defendant's liability, and the *litis æstimatio*, or measure of damages, the *judex* seems to have been clothed with a large discretion. This discretion was, however, restrained and limited to a certain extent by several special statutes.[1]

The general definition of damages, *id quod interest* or *utilitas* of the civil law, in the Code of Justinian, is the actual loss sustained and the profit which might have been made—*in quantum mea interfuit, id est quantum mihi abest, quantumque lucrari potui.*[2] A more distinct subdivision of the subject is into *damnum emergens* or loss arising, and *lucrum cessans*, or profit prevented.[3] But how far in each case the party is liable, when for *damnum emergens* only, when for *lucrum cessans*, and to what extent, the texts of the Roman law leave us greatly in doubt. They inquire in each case whether the party

[1] See as to the three stages of the Roman procedure,—the *Legis actiones;* the *Formula* introduced about 650 A.U.C.; and the forms of the Empire,—Das Römische Privat Recht von Wilhelm Reim, book 5.

[2] Rat. Rem. Hab. Dig. 46, tit. viii, § 13.

[3] Dig. de Damno Inf. lib. 26 (39, 2).

is to be considered guilty of *dolus*, fraud or evil design, or of *culpa* only; if of *culpa*, whether *culpa lata*, or *culpa levis* merely; and the nice shades of distinction which they attempt to define, have at once excited and baffled the ingenuity of modern commentators. In all these questions the *judex* appears to have exercised a very considerable discretion.[1]

§ 23. **How awarded under Roman law.**—In the award of compensation, or damages, as we term it, the *litis æstimatio*, the *judex* seems also to have been little bound by any settled rules. In cases of fraud or gross negligence, which is as near as we can render *dolus* and *culpa lata*, the plaintiff or *actor* was permitted himself to swear to the amount of injury sustained; and there seems originally to have been no check on this prerogative, *in infinitum jurari potuit;* but this license was restrained by positive provisions, which gave the power of assessment to the *judex*.[2] To check still more effectually the abuses which would necessarily flow from such a state of things, various statutory provisions were introduced, and an effort was made to obviate the difficulty by fixed valuations not to be departed from.[3]

§ 24. **Arbitrary rules of reparation under Roman law.**—An arbitrary rule of a very singular character was

[1] Ueber die Frage wie weit in einem jeden Falle das Interesse praestirt werde, ist in dem Römischen Rechte wenig vorhanden, woraus sich bestimmte Grundsätze ableiten liessen. Doch geht die gewöhnliche Meinung dahin, dass in Fallen, wo *Dolus* oder *Culpa lata* oder *Contumacia insignis* die Ursache des Schadens sei, so wohl *damnum* als *lucrum*, hingegen wo nur eine gewöhnliche culpa zum Grunde liege, bloss das *damnum emergens* vergütet werde.—Haenel, *vom Schandenersatze*, Leipzig, 1823, § 81. The books of the German scholars are numerous; see "Die Culpa des Römischen Rechts," von J. C. Hasse, edited by Bethmann Holweg, Bonn: 1838. But the writers of this class, though profound scholars and acute reasoners, appear to lose themselves in a maze of contradictory and obscure citations from the vast storehouse of the Pandects, and in a perhaps still more hopeless metaphysical labyrinth of abstract discussions on the different shades of fraud and fault. Nothing do they less resemble than the clear and practical manner of our writers

[2] D. de in Lit. Jur. l, 4, § 2 (12, 3); l, 5, § 1 cod. Haenel, § 95, p. 110.

[3] Rat. Rem. Hab. Dig. lib. 46, tit. viii, § 13.

established by the *Lex Aquilia*,[1] which provided by its first chapter, that in case of the killing of any slave or cattle, unless by mere chance, the trespasser should pay the master as much as the property had been worth at any time within the year. *Damni injuriæ actio constituitur per legem Aquiliam; cujus primo capite cautum est, ut si quis alienum hominem, alienamve quadrupedem, quæ pecudum numero sit, injuriâ occiderit, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur.*[2] So that if a slave was killed who at the time of his death was a cripple, but within the year had been sound and valuable, his full value as sound was to be paid. By the third chapter of this law, other kinds of intentional or negligent injury to property were punished; but in these cases the estimate of damages was limited to the highest value of the thing injured within thirty days previous. *Non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.*[3] The remedy given by the *Lex Aquilia* may be considered as very analogous to our actions of trespass and case;[4] but it was limited to wrongs actively perpetrated, and mere acts of nonfeasance did not come within its scope.[5] In consequence, other enactments were made, and the same principle of arbitrary and fixed valuation was applied to matters of contract for sums certain,[6] in which cases it was provided that damages

[1] Inst. lib. iv, tit. iii, De Lege Aquiliâ, Dig. lib. ix, tit. ii, Ad Legem Aquiliam. This law is said to have been passed as early as 467 A.U.C.

[2] See, on this subject, in the works of Molinæus (Dumoulin, ed. 1861, vol. iii, p. 422), his "Tractatus de eo quod interest." It is frequently referred to by Pothier as one of the most valuable expositions of the civil law on the measure of damages.

[3] Inst. lib. iv, tit. iii, § 14.

[4] Inst. lib. iv, tit. iii, § 9; Brown's Civil and Admiralty Law, bk. iii, ch. i, vol. ii, p. 401; Cooper's Justinian, in notes; Hugo, § 238. The provisions of the law are very curious, and worthy of a more careful examination than the scope of this work permits.

[5] Zuvöderst waren alle Beschädigungen ausgeschlossen die in einem blossen Nichtthun bestehen.—Hasse, *Culpa des Römischen Rechts*, § 6, p. 21.

[6] Code, lib. vii, tit. 46. De sent. quæ pro eo quod int. prof.

should not be given beyond the double of the amount in question: *hoc quod interest dupli quantitatem minime excedere.*[1]

§ 25. **Civil law.**—The civil law, as introduced into modern Europe, seems to have retained the early features of its original, in the respect of which we are now speaking, and, instead of laying down any fixed or arbitrary rule, to have left the matter very much to the discretionary consideration of the tribunal which has cognizance of the cause. So, under this system as established in France, and previous to the adoption of the Code Napoleon, damages were divided into interest and damages (*intérêts* and *dommages-intérêts*). *Intérêt* answers precisely to our interest, and is the measure of damages inflicted for the breach of a mere pecuniary obligation, as in the common cases of bills and notes. *Dommages-intérêts* correspond with our term damages in its application to all other forms of action; and in this respect it is that the system appears loose and uncertain.[2]

§ 26. **Dommages-intérêts indefinite.**—After laying down the rule in regard to interest, which, as with us, is limited to a fixed rate, Domat says,[3] "The other kinds of damages are undefined, and are increased or diminished, at the discretion of the judge, according to the facts and

[1] The original of this rule is probably to be found in the Twelve Tables. *Si quid endo deposito dolo malo factum escit, duplione luito. Si depositarius in re deposita dolo quid fecerit in duplum condemnetur.* See Pothier's Pandects, by Bréard Neuville, vol. i, pp. 332, 364, 366.

[2] In addition to the two heads of Interest and Damage, Domat makes a third, of "Restitution des Fruits," which we shall consider under the head of Mesne Profits, it being fairly a branch of the great subject of Damages.

[3] Loix Civiles, part i, liv. 3, tit. v, vol. i, p. 259. Les autres sortes de dommages sont *indefinis*, et ils s'étendent ou se bornent différemment par la prudence du juge, à plus ou à moins selon la qualité du fait et des circonstances. Ainsi, un locataire qui manque aux réparations qu'il doit par son bail, un entrepreneur qui manque de fair l'ouvrage qu'il a entrepris, ou qui le fait mal, doivent *indefiniment* les dommages et les intérêts qui peuvent suivre du défaut d'avoir executé leur engagement; et on les régle différemment, selon la diversité des pertes qui arrivent, la qualité des faits qui les causent, et les autres circonstances.

circumstances of the particular case; thus, in the case of a tenant who omits to make the repairs to which he is bound by his lease, or of a contractor who does not perform his contract, or performs it ill,—in either case they owe an indefinite amount of damages resulting from the default, and these damages are differently regulated according to the diversity of the losses which happen, the nature of the facts, and the attendant circumstances." And he illustrates these rules by one or two cases as to profits claimed as loss, where he says, "It must be left to the discretion of the judge to arrive at some measure of compensation according to the circumstances and the particular usages, if there are any."[1] And again,[2] "It results from all the preceding rules, that as questions of damages depend on the attendant facts and circumstances, they must be decided by a sound discretion, exercised as well with regard to the circumstances of the case as to general principles."

§ 27. **Limited only by the discretion of the judge.**—And so says Pothier:[3] "It is necessary to exercise a certain

[1] P. 262: Il doit dépendre de la prudence du juge d'arbitrer et de modérer quelque dédommagement, selon les circonstances et les usages particuliers, s'il y en avoit.

[2] Book iii, tit. v, sec. 2, § 13, vol. i, p. 270. Il résulte de toutes les régles précédentes, que comme les questions des dommages et intérêts naissent toujours des faits que les circonstances diversifient, c'est par la prudence du juge qu'elles se décident, en joignant aux lumières que les principes doivent donner, le discernement des circonstances et des égards qu'on doit y avoir. In an old French work, 1637, "Recueil des Arrests Notables," is found a curious illustration of the looseness of the old French law in this respect. It says, En estimation des dommages et intérêts quand les experts sont discordans, le juge d'office doit prendre un tiers, et s'ils ne s'accordent, le "juge ne doit suivre ni la haute ni la moindre estimation." So, again, in the Journal des Audiences, t. 6, p. 252, on the question whether a promise given by a female to marry under a *dédit*, or forfeit of a fixed sum, was to be regarded as liquidated damages: "La proposition *stipulatio pœnae in contractu sponsalium apposita improbatur*, est écrite dans tous nos livres qui ont traité de la matière—Dans la jurisprudence on ne s'arrête point à ces stipulations de peine—Les Dommages-intérêts ne sontad jugez que *ad arbitrium boni viri*—suivant que le meritent les cas de mauvaise foi, de la condition des personnes, de la dépense, perte, ou deshonneur.

[3] Traite des Obl. part i, ch. ii, art. 3, § 160. Il faut même, selon les differens cas, apporter une certaine modération à la taxation et estimation des dommages dont le débiteur est tenu.

degree of moderation in estimating the amount of damages, according to the particular case." And again,[1] "Damages are to be moderated where they would otherwise be excessive, by leaving the computation to the arbitrament of the judge." So, again,[2] "Where the damages are considerable in amount, they should not be rigorously assessed, but with a certain degree of moderation." And again, even in cases of fraud:[3] "It must be left to the discretion of the judge, even in cases of fraud, to exercise a certain degree of indulgence in fixing the amount of damages." Merlin uses substantially the same language; he says,[4] "It is to be observed that the law of Justinian, so far as it limits exorbitant or excessive damages to precisely double the value of the thing in controversy, has not the force of law with us [and the Code has not incorporated it among its provisions]; but the principle on which it is founded, being one of natural equity, should be adhered to, by moderating the damages wherever they are too great, by leaving them to the arbitrament of the judge."

§ 28. **Methods of avoiding injustice in the systems considered.**—In the various systems of jurisprudence which we have thus cursorily examined, we see that the difficulty inherent in the subject is sought to be avoided, either by fixing on an arbitrary valuation of the loss sustained applicable to all cases, or by leaving the whole

[1] § 164, Nous devons modérer les dommages et intérêts, lorsqu'ils se trouvent excessifs, en laissant cette modération à l'arbitrage du juge.

[2] Quand les dommages et intérêts sont considérables, ils ne doivent pas etre taxés et liquidés en rigueur, mais avec une certaine modération.

[3] § 168. Il doit être laissé à la prudence du juge, même en cas de dol, d'user de quelque indulgence sur la taxation des dommages et intérêts.

[4] Repertoire; Dommages et Intérêts, vol. viii. Il faut observer que la loi de Justinien, en ce qu'elle réduit précisément au double de la valeur de la chose les dommages et intérêts exorbitans, n'a pas force de loi parmi nous [et le Code Civil ne l'a pas remise en vigueur]; mais le principe sur lequel elle est fondée, étant un principe qui émane de l'équité naturelle, on doit s'y conformer, et en conséquence, modérer les dommages et intérêts lorsqu'ils se trouvent excessifs, en laissant cette modération à l'arbitrage du juge.

matter largely to the discretion of the tribunal which has cognizance of the subject. **

General Principles adopted in the Common-Law System.

§ 29. **Damages consist in compensation for loss sustained.**—* Our law differs very materially from all these systems. By the general system of our law, for every invasion of right there is a remedy, and that remedy is *compensation.* This compensation is furnished in the damages which are awarded.

"Wherever," says Blackstone, "the common law gives a right or prohibits an injury, it also gives a remedy by action."[1] "If a statute gives a right," said Lord Holt, "the common law will give a remedy to maintain that right; *a fortiori*, where the common law gives a right, it gives a remedy to assert it. This is an injury, and every injury imports a damage."[2] "It is the pride of the common law," says the Supreme Court of New York, "that wherever it recognizes or creates a private right, it also gives a remedy for the wilful violation of it."[3] "Another species of property," says Blackstone,[4] "acquired and lost by suit and judgment at law, is that of damages, given to a man by a jury as a compensation and satisfaction for some injury sustained." "Every one," said Lord Holt,[5] "shall recover damages in proportion to the prejudice which he hath sustained." "Damages—*damna* in the common law," says Lord Coke,[6] "hath a special signification for the recompense that is given by the jury to the plaintiff, for the wrong the defendant hath done unto him." "It is a general and very

[1] 3 Bl. Com., ch. viii, p. 123.
[2] Ashby *v.* White, 1 Salk. 19.
[3] Yates *v.* Joyce, 11 Johns. 136. See also Lamb *v.* Stone, 11 Pick. 527; Allison *v.* McCune, 15 Ohio 726; Webb *v.* Portland Manuf. Co., 3 Sum. 189.
[4] 2 Bl. Com., ch. xxix, p. 438.
[5] Ferrer *v.* Beale, 1 Lord Raym. 692.
[6] Co. Litt. 257*a*.

sound rule of law," said Sedgwick, J., delivering the opinion of the Supreme Court of Massachusetts,[1] "that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." "It is a rational and a legal principle," said Shippen, Chief-Justice of the Supreme Court of Pennyslvania,[2] "that the compensation should be equivalent to the injury." "The general rule of law," said Story, J., to the jury on the Rhode Island circuit,[3] "is, that whoever does an injury to another is liable in damages to the extent of that injury. It matters not whether the injury is to the property or the person, or the rights or the reputation of another." **

§ 30. **Both in contract and in tort.**—In all cases, then, of civil injury and of breach of contract ([a]) the declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed. ([b]) Thus, in the case of a breach of contract, the plaintiff should recover "what the pecuniary amount is of the difference between the present state of things and what it would have been if the contract had

[1] Rockwood *v.* Allen, 7 Mass. 254.
[2] Bussy *v.* Donaldson, 4 Dallas, 206.
[3] Dexter *v.* Spear, 4 Mason, 115.

([a]) With the exception of breach of promise of marriage, where the amount to be recovered is left largely to the discretion of the jury and of those cases of torts in which the jury are permitted to inflict exemplary or vindictive damages. In Milwaukee & St. Paul Ry. Co. *v.* Arms, 91 U. S. 489, Davis, J., treating of exemplary damages, said: "It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded."

([b]) Smith *v.* Sherwood, 2 Tex. 460; Griffin *v.* Colver, 16 N. Y. 489; Parke, B., in Robinson *v.* Harman, 1 Ex. 850.

been performed." [a] For example, where the United States Government suspended work on a contract which the plaintiff had with it to supply materials and labor, it was held that the proper method was to estimate what sum would place the claimant in the same condition that he would have been in if he had been allowed to proceed without interference. [b] So, in actions of tort, the damages awarded should be an amount sufficient to indemnify the plaintiff for the loss which he has suffered at the hands of the defendant. [c] In short, the purpose of awarding damages is the same whatever the form of action. "In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort; except in those special cases where punitory damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy." [d] Hence it follows that the consideration for the contract does not furnish the measure of damages. Accordingly, in an action against an attorney for failure to perform certain services at an agreed price, it was held error to charge that the plaintiff could recover the sum paid less the value of services actually rendered, and Rapallo, J., said

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[a] Blackburn, J., in Wall *v.* City of London R. P. Co., L. R. 9 Q. B. 249. Again, in Hobbs *v.* London & S. W. Ry. Co., L. R. 10 Q. B. 111, he expresses the same idea, saying, "What the passenger is entitled to recover is the difference between what he ought to have had and what he did have."

[b] U. S. *v.* Smith, 94 U. S. 214. This rule, however, is not always applied to a breach of contract concerning real property.

[c] Baker *v.* Drake, 53 N. Y. 211.

[d] Rapallo, J., in Baker *v.* Drake, 53 N. Y. 211, 220. In admiralty, also, the rule is *restitutio in integrum*. The Clyde, Swabey, 23, 24; The Gazelle, 2 W. Rob. 279; The Baltimore, 8 Wall. 377, 385; Clifford, J., in The Atlas, 93 U. S. 302, 308.

that the damages should be measured by the injury done and not by the fee paid. (a) On the same principle, in an action for covenant not to manufacture, it was held that the measure of damages was what the plaintiff had lost, and that though what the defendant had gained might be evidence of what the plaintiff had lost, it would be evidence only. (b) In an action on a penal bond given to the State by the defendant in consideration for a loan, one of the conditions of the bond being that the debtor should make annual reports to the governor, it was held that the measure of damages was the loss actually sustained, and not the amount of the loan. (c)

§ 31. **The amount determined by rules of law.** — *The amount of the compensation is not governed by any arbitrary method of assessment, nor, on the other hand, left to fluctuating discretion of either judge or jury. It is awarded (except in those cases to which we have referred) according to certain rules of law which the jury are not at liberty to disregard, and which equally control the conduct of the court. "In cases," said Washington, J., on the Pennsylvania circuit,[1] "where a rule can be discovered, the jury are bound to adopt it. That rule is, that the plaintiff should recover so much as will repair the injury sustained by the misconduct of the

[1] Walker *v.* Smith, 1 Wash. C. C. 152.

(a) Quinn *v.* Van Pelt, 56 N. Y. 417; acc., Bennett *v.* Buchan, 61 N. Y. 222.

(b) Peltz *v.* Eichele, 62 Mo. 171.

(c) Jemison *v.* Gov. of Alabama, 47 Ala. 390; acc., Murray *v.* Jennings, 42 Conn. 9. In Indiana, it has been said that the measure of damages for the violation of a simple contract, where vindictive damages are not authorized, is the amount necessary to put the party injured in as good a condition as if he had not made the contract. Jones *v.* Van Patten, 3 Ind. 107. This, however, is clearly wrong. Wilson *v.* Whitaker, 49 Pa. 114, is also inconsistent with the above principles.

defendant." In regard to the rate of damages on a foreign bill of exchange, the New York Court of Errors said, "In this, as in other cases of contract, the rule by which the amount or extent of redress should be ascertained, is a question of law." The amount of compensation, or, in other words, the measure of damages, is, therefore, as a general rule, matter of law, to be disposed of by the court.

§ 32. **Damnum absque injuriâ and injuria sine damno.**— It is not, however, to be understood that legal relief is to be had for every species of loss that individuals sustain by the acts of others. It is undoubtedly true that damage resulting from fraud, deceit, or malice, always furnishes a good cause of action.[2] "This principle," says the Supreme Court of Ohio, "is one of natural justice, long recognized in the law."[3] But where the injury is not to be traced to any evil motive, the rule is by no means universal that injury is always entitled to redress. In addition to the great class of moral rights and duties which the law does not attempt to protect or enforce,[4] there are many sufferings inflicted by human agency, where the immediate instruments of the injury are free from fault, or the act beyond their control. In these cases the law does not seek to interfere.[5] It is only legal

[1] Graves *v.* Dash, 12 Johns. 17.

[2] Pasley *v.* Freeman, 3 T. R. 51; Upton *v.* Vail, 6 Johns. 181; Barney *v.* Dewey, 13 Johns. 224.

[3] Bartholomew *v.* Bentley, 15 Ohio, 659, 666.

[4] Pasley *v.* Freeman, 3 T. R. 51.

[5] Such are the cases governed by the maxim, *Salus populi suprema lex.* "There are many cases," says Mr. Broom, in his work on Legal Maxims, p. 1, "in which individuals sustain an injury for which the law gives no action, as where private houses are pulled down, or bulwarks raised on private property for the preservation and defence of the kingdom against the king's enemies." Such, again, are those which fall within the maxim *Necessitas inducit privilegium quod jura privata.* "As a general rule," says Mr. Broom, in his work above cited, p. 6, "the law charges no man with default where the act done is compulsory and not voluntary, and where there is not a careful selection on his part; and, therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carries a privilege in itself."

injury that sets its machinery in operation; and this is meant by the maxim that *damnum absque injuriâ* gives no cause of action.[1] So, if in the prudent and reasonable exercise, by an owner of property, of his right of dominion, another sustains damage, it is *damnum absque injuriâ*.[2] So it has been said in regard to a corporation charged with committing a nuisance, "If the defendants have only pursued the path presented for them by the laws from which they derive their existence, they have committed no wrongful act. Though the plaintiffs may have sustained damage, it is indeed *damnum absque injuriâ;* for the act of the law, like the act of God, works no wrong to any one."[3] (a) There must not only be loss, but it must be injuriously brought about by a violation of the legal rights of others. "No one, legally speaking," says the Supreme Court of New York, "is injured or damnified unless some *right* is infringed. The refusal or discontinuance of a favor gives no cause of action,"[4] (b) The prosecution of this inquiry, however, would lead us directly into the great field of causes of

[1] Ashby *v.* White, 1 Salk. 19; S. C. 2 Ld. Raym. 938; Lamb *v.* Stone, 11 Pick. 527; Broom's Legal Maxims, 93. "In point of law," said Rolfe, B., in Davies *v.* Jenkins, 11 M. & W. 745, 756, where process had been by mistake served on the wrong person, "if the proceedings have been adopted purely through mistake, though injury may have resulted to the plaintiff, it is *damnum absque injuriâ*, and no action will lie." "This is one of those unfortunate cases," says the same learned judge, in Winterbottom *v.* Wright, 10 M. & W. 109, 116,—a suit by a mail coachman against a contractor for supply of mail coaches for injury resulting from a coach breaking down,—"in which there certainly has been *damnum*, but it is *damnum absque injuriâ*." So in Massachusetts, where the owner of land made an excavation therein near the street, and a person in the night-time fell in; held, that the owner was not liable. "Where neither party is in fault," said the Supreme, "and an accident takes place, it is *damnum absque injuriâ*."—Howland *v.* Vincent, 10 Met. 371, 374.

[2] Gardner *v.* Heartt, 2 Barb. 165.

[3] First Baptist Church *v.* Sch'y & Troy R.R. Co., 5 Barb. 79, 84.

[4] Mahan *v.* Brown, 13 Wend. 261, 265, where it was held that an action will not lie for obstructing a neighbor's lights, if they be not ancient lights, and no right has been acquired by grant or occupation and acquiescence.

(a) Donovan *v.* The City of New Orleans, 11 La. Ann. 711.

(b) See Steuart *v.* State of Maryland, 20 Md. 97.

action. Suffice it for our present purposes to say that whenever loss is coupled with legal injury, the law gives compensation.

It is further to be borne in mind, that if loss without legal injury goes unredressed, the correlative proposition is equally true, that the infringement of a legal right, when unattended by any positive injury, furnishes no ground for other than nominal relief. It is not sufficient that an act unauthorized by law has been committed. For *Injuria sine damno* there is no compensation. Substantial loss to the party plaintiff must have ensued to entitle him to substantial relief. *De minimis non curat lex.*[1] ([a]) But of this we shall have occasion to take notice again, when we come to consider the subject of nominal damages. **

§ 33. **Fletcher v. Rylands.**—In Fletcher *v.* Rylands ([b]) the plaintiffs were owners of a mine which they had worked under the defendants' land. The defendants erected on their own land a reservoir for the purpose of working their mill. There were some old shafts in the defendants' land which had become partly filled, but connected below with the plaintiff's mine. Of these the defendants knew nothing. The reservoir was not made sufficiently strong with regard to the shafts, and, in consequence, the water burst into the shafts and flooded the plaintiff's mine. In the Court of Exchequer, it was held, Bramwell, B., dissenting, that the plaintiff could not recover without showing want of due care on the part of the defendants.([c]) On appeal to the Exchequer Chamber,

[1] Paul *v.* Slason, 22 Vt. 231.

([a]) *De minimis non curat lex* does not prohibit the allowance of nominal damages. Fullam *v.* Stearns, 30 Vt. 443.

([b]) L. R. 1 Ex. 265. ([c]) 3 H. & C. 774.

this decision was reversed, Blackburn, J., delivering the opinion. He said: "We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." In support of this doctrine, he cited the rule in the case of cattle escaping from control, without negligence on the part of the owners, and the case of Tenant *v.* Goldwin,(a) where a defendant was held liable for filth flowing from his cellar through defects in the wall. On appeal to the House of Lords, this judgment was affirmed.(b) Lord Cairns drew a distinction between a natural and a non-natural user of land, defining the latter as "introducing into the close that which in its natural condition was not in or upon it"; and held that, in the latter case, the defendant acted at his peril. In Losee *v.* Buchanan (c) the plaintiff's house was injured through the bursting of a boiler on the defendant's land. It was held that the defendant was only liable for negligence. Earl, C., said that the rule in the case of the escape of animals did not furnish analogies absolutely controlling in reference to inanimate objects. He considered Fletcher *v.* Rylands in conflict with the law of this country, especially those cases holding that if one light a fire on his land and it spread to his neighbor's, the former is liable only in case of negligence. He then said: "This examination has gone far enough to show that the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or

(a) 6 Mod. 311. (b) L. R. 3 H. L. 330. (c) 51 N. Y. 476.

property of another, without some fault or negligence on his part." In a case in New Jersey, precisely like the last case in its facts, the same conclusion was reached.[a] Beasley, C. J., after saying that in principle the case could not be distinguished from Fletcher *v.* Rylands, said that the fallacy in that case, consisted in extending into a general principle the rule relating to cattle, a class of cases to be regarded as in a great degree exceptional. He then referred to the case of Tenant *v.* Goldwin, and remarked, that allowing the cellar to get out of repair was in itself negligence, and that nothing was said as to the defendant's liability, had he taken all proper precautions to prevent the escape of the filth. He said that this case partook largely of the character of nuisances. He then said: "The common rule, quite institutional in its character, is, that in order to sustain an action for a tort, the damage complained of must have come from a wrongful act." In New Hampshire, the doctrine of Fletcher *v.* Rylands has also been disapproved.[b] The defendant's horses became frightened by a locomotive, and escaping from the defendant's control, ran upon the plaintiff's land and injured a post. Doe, J., in a very elaborate opinion, endeavored to show the consequences to which the doctrine of Fletcher *v.* Rylands must lead. After quoting the language of Blackburn, J., cited *supra*, he said: "This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the defendant. The ancient rule was, that a person in whose

(a) Marshall *v.* Welwood, 38 N. J. L. 339.
(b) Brown *v.* Collins, 53 N. H. 442.

house or on whose land a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss. . . . . One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood." (a) But in Massachusetts the doctrine seems to have been regarded with more favor. In Shipley *v.* Fifty Associates (b) the defendant built a house in Boston, with a high pitched roof, so situated that anything falling off the roof would naturally fall into the street. During the winter some ice slid off the roof and injured a passer. It was held that the defendant was liable. Ames, J., cited the opinions of Lord Cairns and of Blackburn, J., but he also put the decision on the ground that, from the position and style of the building it was highly probable the accident would occur. It was therefore a clear case of negligence, and in that distinguishable from Fletcher *v.* Rylands. In Wilson *v.* New Bedford (c) the defendants had built a dam and made a reservoir under a power conferred by statute, but owing to the increased pressure, the water percolated through the soil and flooded the plaintiff's cellar. The statute made the defendant liable for all damage caused by the construction of the reservoir. The plaintiff had repeatedly, during two years, demanded payment for the damage sustained by him. The Court, on the authority of several Massachusetts cases, in which damages sustained through artificial percolation had been recovered, and on the author-

(a) See further Sweet *v.* Cutts, 50 N. H. 439; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 569.

(b) 106 Mass. 194. (c) 108 Mass. 261.

ity of a New York case, and of Fletcher *v.* Rylands, held the defendants liable. This case is clearly distinguishable from Fletcher *v.* Rylands, as the defendant continued the use of the land after it had notice of the injury it was causing. Although nothing is said in the opinion on this point, it is to be noticed that one of the cases cited in support of the judgment, and in which Fletcher *v.* Rylands was cited, Ball *v.* Nye,[a] was decided expressly on this ground. The other two Massachusetts cases on which Wilson *v.* New Bedford was decided, were actions for damages for percolation, arising from flowing lands for mills, and it was held that damages by percolation were the natural consequences of flooding the lands, no questions of *damnum absque injuria* being raised. The case cited from New York, Pixley *v.* Clark,[b] was one where the defendants dammed a stream, and caused percolation on the plaintiff's land. Peckham, J., in an elaborate review of the cases, held the defendants liable. But he placed his decision on the ground that there was no difference between flooding land from the direct overflow of the stream and from percolation, and in Losee *v.* Buchanan, *supra*, this decision was said to be an application of the principle, *aqua currit et debet currere*, to the facts of the case. Peckham, J., also pointed out the fact that the defendants continued their works without change, after they knew the injury it was causing, saying: "These defendants tried an experiment for their own benefit and found it seriously injured the plaintiff. When they see the injury they insist upon continuing it." A second distinction to be drawn between Wilson *v.* New Bedford and Fletcher *v.* Rylands seems to be, that in the former the injury was a direct and nat-

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[a] 99 Mass. 582.

[b] 35 N. Y. 520.

ural consequence, flowing from the use of the defendant's land in the very manner in which it was intended to be used, whereas, in Fletcher *v.* Rylands, the use to which the defendant intended to put his land was by a wholly and unforeseen circumstance entirely destroyed, and the injury resulted not from the use for which he intended it, but from the destruction of this use. This same distinction was drawn in Losee *v.* Buchanan between the facts of that case and of Hay *v.* Cohoes Co.([a]) In the latter case, the defendants were authorized to dig a canal. In blasting, a piece of rock was thrown against the plaintiff's house; it was held that the defendant was liable without any proof of negligence on his part. Earl, C., said of this decision, in Losee *v.* Buchanan, that it was based upon the soundest principles. "The damage was the necessary consequence of just what the defendant was doing." In McKeon *v.* See ([b]) the defendant was held liable for injury caused by his machinery jarring the walls of the plaintiff's houses. And in Gray *v.* Harris,([c]) Chapman, C. J., says: "The degree of care which a person is bound to use in constructing a dam across a stream . . . . must be in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient." In Smith *v.* Fletcher ([d]) the defendants by working their mines had caused hollows to form in the surface of the land. A watercourse ran across their land which they had diverted from its original channel. In an extraordinary freshet the water overflowed the banks of the stream, into the hollows, thence through openings made into the defendant's mines, and thence into the plaintiff's mine. The Court of Exchequer held the case not to be distin-

([a]) 2 N. Y. 159: *acc.* Colton *v.* Onderdonk, 69 Cal. 155.
([b]) 51 N. Y. 300. ([c]) 107 Mass. 492. ([d]) L. R. 7 Ex. 305.

guishable from Fletcher *v.* Rylands, but on appeal to the Exchequer Chamber this decision was reversed and sent back for a new trial. Lord Coleridge said that the case was not in every respect within the authority of Fletcher *v.* Rylands, and thought it desirable that the opinion of the jury should be taken whether the defendant's acts were done in the ordinary reasonable and proper mode of working the mine. On a new trial the jury found that the flooding was caused by the diversion of the stream, and that the diverted channel was insufficient, and more likely to overflow than in its original condition. The case was carried to the House of Lords,(a) and Lord Penzance held the findings of the jury to be conclusive against the defendant. He said that apart from these findings there would have been a question what obligations the defendants took upon themselves in diverting the channel. He expressed the opinion that the new course must be in itself capable of conveying such rainfalls as might reasonably be anticipated, and that the defendants were not bound to make provision for any quantities of rain however heavy that might be discharged into it. In Wilson *v.* Waddell (b) the defendant's mining operations caused the surface land to split so that in rain-storms the water passed through and flooded the plaintiff's land. This was held not to create any cause of action, but to be a case of *damnum absque injuria*, on the ground that the use of the land was a natural one, and necessarily caused the cracking of the surface. In Nichols *v.* Marsland (c) the defendant's reservoir through an extraordinary fall of rain gave way and carried off some bridges. It was held on appeal that the law imposed a duty upon the defendant to keep the water

(a) 2 App. Cas. 781. (b) 2 App. Cas. 95. (c) 2 Ex. Div. 1.

within bounds, but that it was a general rule that if an act of God prevented the performance of a duty imposed by rule of law, the defendant was excused from liabilities, and it was held that the unusual rainfall must be considered an act of God. In Jones *v.* Festiniog Ry. Co.(a) the Court, following Fletcher *v.* Rylands, held that the defendant was liable for the escape of sparks from an engine without any negligence on his part, the use of engines not being especially provided for in the company's charter. The case was distinguished from Vaughan *v.* Taff Vale Ry. Co.,(b) where the Exchequer Chamber held that there was no liability for the escape of sparks where the use of engines was authorized by statute, and there was no negligence on the defendant's part. If these cases hold that there was no liability for damages resulting necessarily from the use of the engines, they were properly decided on the ground that a grant by the Legislature carries with it the incidents of the grant, one of which here would be immunity from liability for damage necessarily caused. But if it was intended to decide that the legislative sanction relieved the defendant from the duty to restrain under all circumstances the dangerous element it was employing, it seems difficult to understand why the sanction of the common law should not have the same effect. In Cattle *v.* Stockton Water Works (c) the plaintiff was working under a contract with one Knight; the defendant's water-pipes, which their charter had authorized them to construct, burst, flooded Knight's land, and delayed the plaintiff in his work. The Court refused to pass upon the question whether the defendants were relieved from liability on the ground of the sanction of their charter, but held that

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(a) L. R. 3 Q. B. 733. (b) 5 H. & N. 679. (c) L. R. 10 Q. B. 453.

there was no liability to the plaintiff, although there might have been to Knight.

§ 34. **No compensation for loss by nuisance common to all.** —* To this general principle, that where loss and legal injury unite, relief will be given by suit, the law recognizes one exception : that where the wrong is on so great a scale that the whole community, or a large portion of them, suffer from it. "Here," says Blackstone, "I must premise that the law gives no *private* remedy for anything but a *private* wrong."[1] And so the law is laid down by Lord Coke in regard to nuisances on the highway : "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action, for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause." In such case the remedy is by indictment.

§ 35. **Unless particular damage results.**—But Coke goes on immediately to make this distinction : "But if any particular person afterwards, by the nuisance done, has more particular damage than any other, then for that particular injury he shall have a particular action on the case."[2] The rule and the exception have both been repeatedly recognized in England and in the courts of this country, though there has been much controversy as to the nature and amount of the "particular damage" that will support the action. It has been held in England that an obstruction of a navigable creek, by which the plaintiff's vessel was arrested in her course, was sufficient to main-

[1] 3 Bl. Com. 219 ; 4 ib. 167 ; Broom's Legal Maxims, 206.

[2] Williams's case, 5 Rep. 72.

tain a suit;[1] and where a corporation bound to repair certain banks, mounds, sea-shores, and piers neglected to do so, in consequence of which the plaintiff's house was injured, it was also held that the action lay.[2] So, again, where a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by the defendant's continuing an unauthorized obstruction across it for an unreasonable time, this was held a sufficient particular damage to be the foundation of an action.[3] The doctrine of these cases has been substantially adopted in this country, as we shall have occasion to see when we come to treat of trespasses to real estate.[4]

[1] Rose *v.* Miles, 4 Maule & Sel. 101, which virtually overruled Hubert *v.* Groves, 1 Esp. 148, and Paine *v.* Partrich, Carth. 191; and the doctrine of Rose *v.* Miles was affirmed in Greasly *v.* Codling, 2 Bing. 263, as to a highway. The authority of Hubert *v.* Groves has also been denied in this country. Lansing *v.* Wiswall, 5 Denio 213.

[2] The Mayor and Burgesses of Lyme Regis *v.* Henly, 1 Bing. N. C. 222.

[3] Wilkes *v.* Hungerford Market Company, 2 Bing. N. C. 281, where the authority of Hubert *v.* Groves was again denied.

[4] Pierce *v.* Dart, 7 Cowen 609; Lansing *v.* Smith, 8 Cowen 146; s. c. 4 Wend. 9; Mills *v.* Hall, 9 Wend. 315; The Mayor, etc. *v.* Furze, 3 Hill 612; Myers *v.* Malcolm, 6 Hill 292; Lansing *v.* Wiswall, 5 Denio 213; First Baptist Church *v.* Sch'y & Troy R.R. Co., 5 Barb. 79; Baxter *v.* Winooski Turnpike Co. 22 Vermont 114; Stetson *v.* Faxon, 19 Pick. 147. In the Proprietors of the Quincy Canal *v.* Newcomb (7 Met. 276), it was said, that if a party "had suffered damage from the filling up of a canal and want of cleansing, by means of which he was unable to enter it, it would have been a damage suffered in common with all other members of the community, and therefore redress must be sought by a public prosecution. Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in a highway, and hurts his horse, or sustains a personal damage, then he may bring his action."

In Pennsylvania, the rule has been applied to an obstruction in the Big Schuylkill, which prevented the plaintiff's rafts from descending. Hughes *v.* Heiser, 1 Binney 463. In that State, when a private person suffers some extraordinary damage beyond other citizens, by a public nuisance, he shall have a private satisfaction by action, even if his special damage be merely consequential. Pittsburgh *v.* Scott, 1 Barr 309. In Kentucky, it has been said that it is not enough that one be turned out of the way. Barr *v.* Stevens, 1 Bibb 292. In Connecticut, see Bigelow *v.* Hartford Bridge Co., 14 Conn. 565; and O'Brien *v.* Norwich & W. R. R. Co., 17 Conn. 372. The doctrine is the same in regard to abatement: "The ordinary remedy for a public

We shall be obliged to make a more minute examination of this subject when we come to speak particularly of the subject of Nuisances; but we should not omit to notice here that in cases like these, in which the right to relief depends upon the amount of injury, we may be said to approach a vanishing point, where all distinctions between the cause of action and the rule of compensation are confounded and lost.

§ 36. **Nor by way of settlement for crime.**—It is proper here to call attention to the distinction maintained between those cases of a criminal character which can be compromised by the parties themselves, and those in which no such private interference is permitted. It was early held, that a contract to withdraw a prosecution for perjury is founded on an unlawful consideration and void. If the party charged were innocent, the law was abused for the purpose of extortion; if guilty, it was eluded by a corrupt compromise, screening the criminal for a bribe.[1] The subject has been much considered in subsequent cases; and it seems now to be well settled that the right to compromise depends on the right to recover damages in a civil action. "The law permits a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature only, no agreement can be valid that is founded on the consideration of stifling a prosecution for it;" therefore, although the party injured may lawfully compromise an indictment for a common assault,

nuisance is itself public—that of indictment—and each individual who is only injured as one of the public can no more proceed to abate than he can bring an action."—Mayor of Colchester *v.* Brooke, 7 Q. B. 339, 377.

[1] Collins *v.* Blantern, 2 Wils. 341, 347.

yet an agreement to pay the costs of a prosecution of an assault on the plaintiff and riot, and of an action for a wrongful levy under a *fi. fa.*, which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution, is altogether invalid as founded on an illegal consideration.[1] **

[1] Keir *v.* Leeman, 6 Q. B. 308, 321.

CHAPTER II.

COMPENSATION.

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§ 37. **The elements of injury.**—* It has been said that the effect of our law is to give in damages what it calls compensation. When, however, we come to analyze this phrase, we shall find its juridical interpretation a very restricted one. Injury resulting from the acts or omissions of others, free from any taint of fraud, malice, or wilful wrong, consists:—

First. Of the *actual pecuniary loss directly sustained;* as the amount of the note unpaid; the value of the property paid for, but not delivered.

Second. Of the *indirect pecuniary loss* sustained in consequence of the primary loss; the profits that might have been made if the contract had been performed, the derangement and disturbance produced by the failure of others to comply with their engagements, and the consequent inability of those who depend on them to adhere to their own; loss of credit; loss of business; insolvency.

Third. Of the *physical and mental suffering* produced by the act or omission in question; pain; vexation; anxiety.

Theory of damages, and Object of Compensation. ante § 30

Fourth. The *value of the time* consumed in establishing the contested right by process of law, if suit become necessary.

Fifth. The *actual expenses* incurred to obtain the same end—costs and counsel fees.

To these one further element is to be added in those cases where the aggressor is animated by a fraudulent, a malicious, or an oppressive intention, and that is—

Sixth. The *sense of wrong or insult*, in the sufferer's breast, resulting from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult. This constitutes the difference, and the only difference between the injury produced by inability and that produced by design. All the other constituents are the same. The pecuniary loss, direct and indirect, the anxiety, the time and expense, are the same whether a wrong be done through the honest inability, the wilful fraud, or the deliberate malice of the offending party. But in the two latter cases, the last element is superadded; a sense of wrong or insult which does not exist in the former.[1]

§ 38. **Perfect compensation impossible.**—All the items must, therefore, be taken into the account in any effort to make complete *compensation*, in the ordinary acceptation of the word. But we shall find that the legal meaning of the term is very different. In fact, unless the word is used in a technical sense, it is altogether inaccurate to speak of damages as always resulting in *compensation;*

[1] The Scotch law is the only one, so far as we are aware, which has endeavored practically to analyze the elements of injury. By the jurisprudence of Scotland, in actions for personal torts, the damages are divided into *special damages*, the actual pecuniary loss, and *solatium*, solace, or recompense for the wounded feelings. So in Forgie *v.* Henderson, 1 Murray 410, in assault and battery, the Lord Chief Commissioner Adam said, "There are, first, *special damages*, consisting of the surgeon's account, and the person being kept from his work. Second, the *solatium*, which is peculiarly within the province of the jury." So in Cameron *v.* Cameron, 2 Murr. 232, "If no damages are proved, you cannot find them; but there is a claim for *solatium*, and you must consider what evidence there is of the injury to the mind and feelings."

and whatever restricted meaning this term may be supposed to have technically acquired, it is at all events entirely incorrect to say in the language which we have above seen used by various eminent judges, that "the remedy is commensurate to the injury." This language attributes to legal relief a degree of perfection which it is very far from possessing. "It would be going a great way," said Chief-Justice Marshall,[1] "to subject a debtor, who promises to pay a debt, to *all the loss* consequent on his failure to fulfil his promise. The general policy of the law does not admit of such strictness; and although in morals a man may justly charge himself as the cause of any loss occasioned by the breach of his engagement, yet, in the course of human affairs, such breaches are so often occasioned by events which were unforeseen, and could not easily be prevented, that interest is generally considered as compensation which must content the injured." "It has been contended," said another eminent judge, "that the true measure of damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment."[2] And it is to be borne in mind, that the same deficiency of compensation exists in the case of defendants as well as plaintiffs. If the party who receives the injury is obliged to bear his proportion of the loss—so, on the other hand, the party wrongfully charged recovers his costs only, and no allowance is made for his time, indirect loss, annoyance, or counsel fees. "Every defendant," says Mr.

[1] Short *v.* Skipwith, 1 Brock. 103, 114.

[2] Tilghman, C. J., in Bender *v.* Fromberger, 4 Dall. 436, 444.

Broom, "against whom an action is brought, experiences some injury or inconvenience beyond what the costs will compensate him for."[1] **

To say nothing of the anxiety and pain of mind which often result from a breach of contract, and which the law is powerless to assuage, all lawyers know that in most cases of the non-payment of money when due, where the creditor has no means of replacing it, and indeed, in a large proportion of all lawsuits, the mere delay in obtaining such redress as can be had, entails on the sufferer consequential damages often serious, sometimes ruinous, for which there is no legal compensation. To quote the language of an article[2] entitled "The Rule of Damages in Actions ex delicto," published in the Law Reporter in June, 1847, "In the most ordinary case of a suit on a note of hand, the damages do not amount to compensation. Who pays the counsel fees? Who pays for the time of the plaintiff? Who pays for his annoyance and vexation? The most successful lawsuit is too often a Barmecide feast."

But although the law does not attempt the impossibility of replacing the plaintiff in exactly the position he was in before the injury, yet within the bounds of possibility its aim is compensation.

§ 39. **The injuries for which compensation is given.**—The injuries for which the common law affords a remedy, and for which, therefore, in a proper case it gives reparation by way of damages, are all comprised in the following classes:

Injuries to property.
Physical injuries.
Mental injuries.

[1] Broom's Legal Maxims, 199; Davies *v.* Jenkins, 11 M. & W. 745, 756.

[2] By the author.

Injuries to family relations.
Injuries to personal liberty.
Injuries to reputation.

It may be laid down as a general rule that *an injury to any right protected by the common law will*, if the direct consequence of an actionable wrong, *be a subject for compensation.*

§ 40. **Compensation for injuries to property.**—For an injury to property resulting in its total loss compensation is recoverable, measured by the value of the property at the time of loss: the principles governing the admeasurement of the value of property will be stated in a later chapter. For an injury to property resulting in a permanent diminution of value, compensation may be recovered for such diminution. Other forms of pecuniary loss may be compensated in a proper case, such as the loss of use of property, the loss of time, etc. All these questions will be discussed at large in later chapters.

§ 41. **For physical pain.**—Physical pain is always regarded as a subject for compensation, this compensation being its pecuniary equivalent as measured by the jury.(a)

(a) Phillips *v.* Southwestern Ry. Co., 4 Q. B. Div. 406; Wade *v.* Leroy 20 How. 34; Beardsley *v.* Swann, 4 McLean 333; Hanson *v.* Fowle, 1 Sawy. 539; Boyle *v.* Case, 9 Sawy. 386; Paddock *v.* Atchison T. & S. F. R.R. Co., 37 Fed. Rep. 841; Carpenter *v.* Mexican N. R.R. Co., 39 Fed. Rep. 315; Campbell *v.* Pullman P. C. Co., 42 Fed. Rep. 484; South & N. A. R.R. Co. *v.* McLendon, 63 Ala. 266; Ward *v.* Blackwood, 48 Ark. 396; Cameron *v.* Vandegriff, 13 S. W. Rep. 1092 (Ark.); Fairchild *v.* California S. Co., 13 Cal. 599; Masters *v.* Warren, 27 Conn. 293; Lawrence *v.* Housatonic R.R. Co., 29 Conn. 390; Larmon *v.* District, 16 D. C. (5 Mackey) 330; Johnson *v.* Baltimore & P. R.R. Co., 17 D. C. (6 Mackey) 232; Cooper *v.* Mullins, 30 Ga. 146; Atlanta & W. P. Ry. Co. *v.* Johnson, 66 Ga. 259; Pierce *v.* Millay, 44 Ill. 189; Indianapolis & S. L. R.R. Co. *v.* Stables, 62 Ill. 313; Chicago *v.* Jones, 66 Ill. 349; Chicago *v.* Langlass, 66 Ill. 361; Chicago *v.* Elzeman, 71 Ill. 131; Sheridan *v.* Hibbard, 119 Ill. 307; Chicago & E. R.R. Co. *v.*

Of necessity the measurement of such compensation must be left entirely to the jury.

§ 42. **For inconvenience.**—Damages will not be given for mere inconvenience and annoyance, such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury. Thus where the plaintiff was delayed on the defendant's railway, and was obliged to remain overnight in a place distant from his destination, it was held that he could recover only the cost of his night's lodging, not his disappointment and annoyance on account of the delay.(a) In an action for breach of contract to give a lease of a house, the fact that the plaintiff is not so conveniently situated in the house subsequently procured as he would have been in the house the defendant agreed to lease him, has been held

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Holland, 122 Ill. 461; Indianapolis *v.* Gaston, 58 Ind. 224; Ohio & M. Ry. Co. *v.* Dickerson, 59 Ind. 317; Huntington *v.* Breen, 77 Ind. 29; Muldowney *v.* Illinois C. Ry. Co., 36 Ia. 462; McKinley *v.* Chicago & N. W. Ry. Co., 44 Ia. 314; Reddin *v.* Gates, 52 Ia. 210; Stafford *v.* Oskaloosa, 64 Ia. 251; Fleming *v.* Shenandoah, 71 Ia. 456; Tefft *v.* Wilcox, 6 Kas. 46; Kansas P. Ry. Co. *v.* Pointer, 9 Kas. 620; Missouri, K. & T. Ry. Co. *v.* Weaver, 16 Kas. 456; Kentucky C. R.R. Co. *v.* Ackley, 87 Ky. 278; Rutherford *v.* Shreveport & H. R.R. Co., 41 La. Ann. 793; Verrill *v.* Minot, 31 Me. 299; Mason *v.* Ellsworth, 32 Me. 271; McMahon *v.* Northern C. Ry. Co., 39 Md. 438; Hawes *v.* Knowles, 114 Mass. 518; Ross *v.* Leggett, 61 Mich. 445; Memphis & C. R.R. Co. *v.* Whitfield, 44 Miss. 466; Stephens *v.* Hannibal & S. J. R.R. Co., 96 Mo. 207; Ridenhour *v.* Kansas C. C. Ry. Co., 13 S. W. Rep. 889 (Mo.); Steiner *v.* Moran, 2 Mo. App. 47; McMillan *v.* Union P. B. W., 6 Mo. App. 434; Cohen *v.* Eureka & P. R.R. Co., 14 Nev. 376; Morse *v.* Auburn & S. R.R. Co., 10 Barb. 621; Brignoli *v.* Chicago & G. E. Ry. Co., 4 Daly 182; Wallace *v.* Western N. C. R.R. Co., 104 N. C. 442; Oliver *v.* Northern P. T. Co., 3 Ore. 84; Pennsylvania R.R. Co. *v.* Allen, 53 Pa. 276; Pennsylvania & O. C. Co. *v.* Graham, 63 Pa. 290; McLaughlin *v.* Corry, 77 Pa. 109; Scott *v.* Montgomery, 95 Pa. 444; Lake Shore & M. S. Ry. Co. *v.* Frantz, 127 Pa. 297; Houston & T. C. Ry. Co. *v.* Boehm, 57 Tex. 152; Giblin *v.* McIntyre, 2 Utah 384; Fulsome *v.* Concord, 46 Vt. 135; Goodno *v.* Oshkosh, 28 Wis. 300.

(a) Hamlin *v.* Great Northern Ry. Co., 1 H. & N. 408.

not to be a cause of damage where the plaintiff is not shown to have lost money by the inconvenience.[a]

But inconvenience amounting to physical discomfort is a subject of compensation.[b] "The injury must be physical, as distinguished from one purely *imaginative;* it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or a refined fancy."[c] It must be "such as is capable of being stated in a *tangible form*, and assessed *at a money value*."[d]

In a case in the Supreme Court of the United States the defendant, a railroad company, had built a round-house near the church edifice of the plaintiff, and interrupted the church services by noise, smoke, and other discomforts. Field, J., said: "The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the Court below very properly said to the jury, the congre-

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[a] Hunt *v.* D'Orval, Dudley 180.

[b] Chicago & A. R.R. Co. *v.* Flagg, 43 Ill. 364; Southern K. Ry. Co. *v.* Rice, 38 Kas. 398; Emery *v.* Lowell, 109 Mass. 197; Ross *v.* Leggett, 61 Mich. 445; Luse *v.* Jones. 39 N. J. L. 707; Ives *v.* Humphreys, 1 E. D. Smith 196; Scott *v.* Montgomery, 95 Pa. 444. But in Walsh *v.* Chicago, M. & S. P. Ry. Co., 42 Wis. 23, the court refused to allow damages for the annoyance of being kept out late at night, though physical discomfort existed.

[c] Bird, V. C., in Westcott *v.* Middleton, 43 N. J. Eq. 478, 486; affirmed 44 N. J. Eq. 297.

[d] Baltimore & O. R.R. Co. *v.* Carr, 71 Md. 135.

gation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury the extent of which the jury may measure." [a]

So where a railroad track was wrongfully laid along the rear of the plaintiff's land, it was held that he might recover compensation for the loss and inconvenience in the prosecution of his business. [b]

In Hobbs *v.* London & S. W. Ry. Co., [c] the plaintiff, a passenger on the defendant's railway, was set down at the wrong station, and a verdict of £8 for inconvenience suffered by having to walk home was sustained on appeal. Cockburn, C. J., said that Hamlin *v.* Great Northern Ry. Co. [d] did not, as was contended for by the defendants, decide that personal inconvenience could not be taken into account as a subject-matter of damage on a breach of contract. Blackburn, J., cited Burton *v.* Pinkerton [e] as an authority to the effect that a recovery can be had for inconvenience. Mellor and Parry, JJ., distinguished the inconvenience appearing in this case, calling it physical inconvenience, which they said could be estimated in damages, from annoyance, loss of temper, vexation, disappointment, which they thought could not be.

Where the plaintiff, a woman, was carried beyond her station by the defendant's fault, it was held that she

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[a] B. & P. Ry. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 335.
[b] Hatfield *v.* C. R.R. Co., 33 N. J. L. 251.
[c] L. R. 10 Q. B. 111.
[d] 1 H. & N. 408.
[e] L. R. 2 Ex. 340.

might recover compensation for the discomforts of a long walk over a dusty road in a hot day, in the course of which she had to wade across creeks and pass at nightfall through a piece of dark woods.([a])

In most cases of contract, there is no specific recovery for inconvenience, which may be regarded as merged in the pecuniary injury. In some cases it has been suggested that personal inconvenience which is the direct consequence of tort would be an item of compensation in such action, but that if an action for the same injury were in form an action of contract, the inconvenience, not being contemplated at the time the contract was entered into, could not be considered in estimating damages.([b]) This is a question which will be discussed in connection with the subject of natural consequences.

§ 43. **For mental injuries—Early misconception of rule.**—It has frequently been made a question whether mental suffering, as distinct from physical suffering, is ever a subject for compensation. The importance of the question, and the more or less doubtful state of the law, call for a careful discussion.

It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental, namely, in cases of assault without physical contact.([c]) Moreover, in actions for false imprisonment where the plaintiff was not touched by the defendant substantial damages have been recovered,

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([a]) Cincinnati H. & I. R.R. Co. *v.* Eaton, 94 Ind. 474; *acc.* Triggs *v.* St. L., K. C. & N. Ry. Co., 74 Mo. 147.

([b]) Cincinnati H. & I. R.R. Co. *v.* Eaton, 94 Ind. 474; Murdock *v.* B. & A. R.R. Co., 133 Mass. 15; Brown *v.* C. M. & St. P. Ry. Co., 54 Wis. 342.

([c]) I. de S. *v.* W. de S., Y. B. Lib. Ass, fol. 99, pl. 60; S. C. Ames, Cas. on Torts 1; Mortin *v.* Shoppee, 3 C. & P. 373; Goddard *v.* G. T. Ry. Co., 57 Me. 202; Handy *v.* Johnson, 5 Md. 450; Beach *v.* Hancock, 27 N. H. 223; Alexander *v.* Blodgett, 44 Vt. 476.

though physically the plaintiff did not suffer any actual detriment.(a) But when the question of allowing damages for mental pain came directly before the courts, these cases seem to have been entirely lost sight of, and it was assumed that mental anguish is not generally a subject for compensation.

This opinion apparently arose from a misconception of Lord Wensleydale's meaning in the case of Lynch *v.* Knight (b), where he said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone: though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." Taking this language in connection with the facts of the case, the meaning is clear. The case was an action of slander, brought for an imputation on the plaintiff's chastity; and the decision was that such an imputation was not actionable without special damage, and that mental pain alone is not such special damage. No question of the measure of damage was under consideration, and the opinion is no authority for the proposition that mental suffering which is the result of an actionable wrong is not in any case a proper subject for compensation.

§ 44. **In actions of tort.**—*Mental suffering as a distinct element of damage* in addition to bodily suffering has been held not to be a subject for compensation.(c) Other

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(a) Wood *v.* Lane, 6 C. & P. 774; Peters *v.* Stanway, 6 C. & P. 737; Grainger *v.* Hill, 4 Bing. N. C. 212; Fotheringham *v.* Adams Ex. Co., 36 Fed. Rep. 252; Courtoy *v.* Dozier, 20 Ga. 369; Hawk *v.* Ridgway, 33 Ill. 473; Gold *v.* Bissell, 1 Wend. 210; Mead *v.* Young, 2 Dev. & Bat. 521.

(b) 9 H. L. C. 577, 598.

(c) Joch *v.* Dankwardt, 85 Ill. 331; Salina *v.* Trosper, 27 Kas. 544; Johnson *v.* Wells, 6 Nev. 224.

cases, however, have allowed recovery.[a] There would be great difficulty in upholding a rule refusing recovery. The result of it would seem to be that if A sees B lying in the street, and threatens him with a club, he is liable in an action of assault for the fright caused; but if A sees B standing, and first knocks him down and then threatens him, he is not liable for the fright, for it is "mental suffering as a distinct element of damage in addition to bodily suffering." It is, however, often true in this sort of case, that the suffering is not the direct result of the injury, and is not a subject of compensation for that reason. So where a physical injury results directly in a miscarriage, physical or mental suffering attending the miscarriage is a proper subject of compensation; but grief for loss of the child cannot be considered, because it is too remote a result of the injury.[b] So where a man brings an action for personal injuries by being thrown from a carriage, his anxiety for the safety of others who were driving with him is too remote a result of the injury for compensation.[c] This distinction seems to be recognized in Illinois, one of the jurisdictions where the supposed rule above stated has been laid down. In Chicago *v.* McLean [d] it was held that the mental suffering which is inseparable from the bodily injury can be recovered for, without allegation of special damage. The Court added: "Any mental anguish which may not have been connected with the bodily injury, *but caused*

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[a] Lunsford *v.* Dietrich, 86 Ala. 250; Pittsburgh C. & St. L. Ry. Co. *v.* Sponier, 85 Ind. 165; Moyer *v.* Gordon, 113 Ind. 282; Parkhurst *v.* Masteller, 57 Ia. 474; Shepard *v.* Chicago, R. I. & P. Ry. Co., 77 Ia. 54; Porter *v.* H. & St. J. Ry. Co., 71 Mo. 66.

[b] Bovee *v.* Danville, 53 Vt. 183; W. U. Tel. Co. *v.* Cooper, 71 Tex. 507.

[c] Keyes *v.* M. & St. L. Ry. Co., 36 Minn. 290.

[d] 8 Lawyers' Reports 765; 24 N. E. Rep. 527.

by some conception arising from a different source," could not be taken into consideration.

In other cases which are often cited in connection with this rule, the defendant's negligence, for which action was brought, infringed no right of the plaintiff's, and therefore gave no right of action to the plaintiff, though as a matter of fact it frightened him.[a] These cases are entirely analogous to Lynch *v.* Knight.[b]

Mental suffering resulting from an injury to property has been held not to be a subject for compensation.[c] But where mental pain was the natural and proximate result of the injury, compensation has been allowed for it. Thus where the defendant entered the plaintiff's land and removed the dead body of his child, it was held that the plaintiff might recover compensation for the mental anguish caused thereby.[d] Where the plaintiff and his family were wrongfully turned out of their house, it was held that he could recover compensation for his sense of shame and humiliation.[e] And where the defendant maliciously injured the plaintiff's horse, it was held that the plaintiff might recover compensation for his wounded feelings.[f]

§ 45. **In actions of contract.**—*Mental suffering resulting from breach of contract* has been held not to be a subject for compensation.[g]

Undoubtedly in most cases of contract, where the basis of the agreement involves the delivery of articles

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[a] Wyman *v.* Leavitt, 71 Me. 227; Canning *v.* Williamstown, 1 Cush. 451.
[b] 9 H. L. C. 577, *supra*.
[c] Smith *v.* Grant, 56 Me. 255.
[d] Meagher *v.* Driscoll, 99 Mass. 281.
[e] Moyer *v.* Gordon, 113 Ind. 282.
[f] Kimball *v.* Holmes, 60 N. H. 163.
[g] Russell *v.* W. U. Tel. Co., 3 Dak. 315.

or the rendering of services having a recognized pecuniary value, or the payment of money, that is, in the great body of cases of contract, the question of mental suffering is excluded. This is very likely a consequence of those general rules governing the allowance of damages, to be discussed hereafter, that damages must be certain, and not remote, and must represent the natural and probable consequences of the act complained of. From the fact that this is the general rule, the consequence has been deduced that there is something in the nature of an action of contract which makes it impossible that the plaintiff should recover damages for injury to feelings. It has been necessary to recognize a supposed exception to the universality of the rule in cases of breach of promise of marriage, where damages for mental suffering are allowed,[a] though it is hard to see any distinction, except that mental suffering is usually the natural and proximate result of a breach of that contract, while it is usually not the natural and proximate result of a breach of an ordinary contract.

But in other cases of breach of contract damages for mental pain are now allowed. Thus in an English case, where a passenger was wrongfully put off a vessel in an insulting manner, it was held that this might be shown to aggravate the damages, though the action was contract.[b] Parke, B. said: "Surely it would make a most material difference if the contract were broken because it would be inconvenient to carry him to his journey's end, and if he were turned out under circumstances of aggravation."

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[a] Collins *v.* Mack, 31 Ark. 684; Tobin *v.* Shaw 45 Me. 331; Coolidge *v.* Neat, 129 Mass. 146; Vanderpool *v.* Richardson, 52 Mich. 336; Wilbur *v.* Johnson, 58 Mo. 600; Southard *v.* Rexford, 6 Cow. 254; Wells *v.* Padgett, 8 Barb. 323; Allen *v.* Baker, 86 N. C. 91.

[b] Coppin *v.* Braithwaite, 8 Jur. 875.

When a telegraph company contracts to deliver a message, and has notice that failure to deliver it will cause mental pain, it is now generally held that in an action against it for failure to deliver the message, the plaintiff may recover compensation for his mental pain.[a] In Chapman *v.* Western U. T. Co.,[b] Holt, J., said: "Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract, and, whenever a party does so, he is liable at least to some extent. Every infraction of a legal right causes injury in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be

[a] Beasley *v.* Western U. T. Co., 39 Fed. Rep. 181; Reese *v.* Western U. T. Co., 123 Ind. 294; Chapman *v.* Western U. T. Co., 13 S. W. Rep. 880 (Ky.); Young *v.* Western U. T. Co., 11 S. E. Rep. 1044 (N. C.); Wadsworth *v.* Western U. T. Co., 86 Tenn. 695; So Relle *v.* Western U. T. Co., 55 Tex. 308; Stuart *v.* Western U. T. Co., 66 Tex. 580, explaining Gulf C. & S. F. Ry. Co. *v.* Levy, 59 Tex. 563; Western U. T. Co. *v.* Cooper, 71 Tex. 507. But *contra*, Russell *v.* Western U. T. Co., 3 Dak. 315; West *v.* Tel. Co., 39 Kas. 93.

[b] 13 S. W. Rep. 880 (Ky.).

seen. A telegraph company is a *quasi* public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for $100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or to the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such a rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. . . . . Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages."

The Supreme Court of Tennessee lays down the rule: "Where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach." (a)

(a) Wadsworth *v.* Western U. T. Co., 86 Tenn. 695, 703.

These cases were followed, and the rule laid down in Wadsworth *v.* Telegraph Co., approved in a recent case in Indiana.([a]) The defendant, an undertaker, agreed to keep the body of the plaintiff's daughter in a vault till the plaintiff should be ready to inter it. Instead of doing so, he allowed a third party to inter the body. It was held that the plaintiff could recover compensation for his mental anguish. Coffey, J., said: "The case is analogous in principle to the case of Reese *v.* Telegraph Co.([b]) In that case it was held that the telegraph company was liable for the mental anguish occasioned by its failure to deliver a message in case of extreme illness. The doctrine announced in that case is fully supported. The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part. . . . . When the appellants contracted with the appellees to safely keep the body of their daughter until such time as they should desire to inter the same, they did so with a knowledge of the fact that a failure on their part to comply with the terms of such contract would result in injury to the feelings of the appellees, and they must, therefore, be held to have contracted with reference to damages of that character, in the event of a breach of the contract on their part."

In many cases, if mental suffering cannot be compensated, only nominal damages can be recovered for a total breach of contract. For instance, if a defendant con-

([a]) Renihan *v.* Wright, 25 N. E. Rep. 822 (Ind.).

([b]) 123 Ind. 294.

tracts not to disturb the plaintiff, ill with nervous prostration, by making a noise, either the court must allow compensation for mental suffering upon breach or else only nominal damages can ever be recovered on the contract. If the latter is the true rule, such a contract can never be enforced.

§ 46. **Difficulty of estimating in money no objection.**—The chief objection urged against the allowance of compensation for mental suffering is that it is not capable of being estimated in money; but that argument might as well be urged against awarding damages for physical pain. "Wounding a man's feelings," said Beckley, C. J.,([a]) "is as much actual damage as breaking his limbs. The difference is, that one is internal and the other external; one mental, the other physical; in either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last the amount is indefinite." "That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether; for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage." ([b])

The Supreme Court of Massachusetts, in a carefully reasoned opinion, has effectually disposed of the objection. The plaintiff claimed compensation for diminution of mental capacity caused by the injury. The court said:([c])

"In all actions of this description, and particularly in

([a]) Head *v.* G. P. Ry. Co., 79 Ga. 358, 360.

([b]) Caldwell, J., in Wadsworth *v.* W. U. Tel. Co., 86 Tenn. 695, 711.

([c]) Ballou *v.* Farnum, 11 All. 73, 77, per Colt, J.

those in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury, so that the jury may be able to award with any certainty a pecuniary equivalent therefor, is at once apparent; and in this difficulty the defendants find argument for the support of their objection. But the answer is, that the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. In a variety of actions founded on personal torts, and in many where no positive bodily harm has been inflicted, the plaintiff is permitted to recover for injury to the feelings and affections, for mental anxiety, personal insult, and that wounded sensibility which follows the invasion of a large class of personal rights. The impossibility, in all such cases, of precisely appreciating in money mental suffering of this description is certainly as great as is suggested where the question is what shall be allowed for a permanent injury to mental capacity. The compensation for personal injury occasioned by the negligence or misconduct of others, which the law promises, is indemnity, so far as it may be afforded in money, for the loss and damage which the man has suffered as a man. Some of its elements may be bodily pain, mutilation, loss of time, and outlay of money; but of more important consideration oftentimes is the mental suffering and loss of capacity which ensues. Of these several items of injury, if compensation is to be confined to those capable of accurate estimate it will include but a small part, and must exclude all those injuries commonly regarded as purely physical; for the difficulty in ascertaining a pecuniary equivalent for the last named is precisely the same and quite as great as any that have been suggested. In fact, it will be found impossible to

fix a limit to injuries of a physical nature so as to exclude from consideration their effect on the mental organization of the sufferer. The intimate union of the mental and physical, the mutual dependence of each organization—if, indeed, for any practical purpose in this regard, they can be considered as distinct—the direct and mysterious sympathy that exists whenever the sound and healthy condition of either is disturbed, render useless any attempt to separate them for the purpose indicated."

§ 47. **Kinds of mental injury compensated.**—It remains to consider the various kinds of mental suffering for which compensation has been awarded. It must be more than mere vexation or loss of temper for being disappointed in a particular thing on which the mind was set. "For mere inconveniences, such as annoyance and loss of temper or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental."([a])

In Hamlin *v.* G. N. Ry. Co.,([b]) Lord Chief Baron Pollock pointed out that in actions founded on a promise of marriage or on a tort, a plaintiff could recover for injury to his feelings, but, he continued, "In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated. . . . . It may be laid down as a rule, that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach."

([a]) Mellor, J., in Hobbs *v.* L. & S. W. Ry. Co., L. R. 10 Q. B. 111; *acc.* Walsh *v.* C., M. & St. P. Ry. Co., 42 Wis. 23.

([b]) 1 H. & N. 408, 411.

1. *Loss of mental capacity* is a proper subject of compensation.(a)

2. *Mental suffering accompanying physical pain* is a subject of compensation.(b) It is difficult in most cases to distinguish the mental from the physical pain, but compensation may be recovered for both.

(a) Ballou *v.* Farnum, 11 All. 73; Wallace *v.* Western N. C. R.R. Co., 104 N. C. 442.

(b) Phillips *v.* London & Southwestern Ry. Co., 4 Q. B. Div. 406; Wade *v.* Leroy, 20 How. 34; McIntyre *v.* Giblin, 131 U. S. clxxiv; Hanson *v.* Fowle, 1 Sawy. 539; Boyle *v.* Case, 9 Sawy. 386; Carpenter *v.* Mexican N. R.R. Co., 39 Fed. Rep. 315; South & N. A. R.R. Co. *v.* McLendon, 63 Ala. 266; Fairchild *v.* California S. Co., 13 Cal. 599; Jones *v.* The Cortes, 17 Cal. 487; Malone *v.* Hawley, 46 Cal. 409; Wall *v.* Cameron, 6 Col. 275; Seger *v.* Barkhamsted, 22 Conn. 290; Masters *v.* Warren, 27 Conn. 293; Lawrence *v.* Housatonic R.R. Co., 29 Conn. 390; Larmon *v.* District, 16 D. C. (5 Mackey) 330; Cooper *v.* Mullins, 30 Ga. 146; Smith *v.* Overby, 30 Ga. 241; City & S. Ry. Co. *v.* Findley, 76 Ga. 311; Pierce *v.* Millay, 44 Ill. 189; Indianapolis & S. L. R.R. Co. *v.* Stables, 62 Ill. 313; Chicago *v.* Jones, 66 Ill. 349; Chicago *v.* Langlass, 66 Ill. 361; Chicago *v.* Elzeman, 71 Ill. 131; Sorgenfrei *v.* Schroeder, 75 Ill. 397; Hannibal & S. J. R.R. Co. *v.* Martin, 111 Ill. 219; Sheridan *v.* Hibbard, 119 Ill. 307; Taber *v.* Hutson, 5 Ind. 322; Nossaman *v.* Rickert, 18 Ind. 350; Wright *v.* Compton, 53 Ind. 337; Indianapolis *v.* Gaston, 58 Ind. 224; Muldowney *v.* Illinois C. Ry. Co., 36 Ia. 462; McKinley *v.* Chicago & N. W. Ry. Co., 44 Ia. 314; Ferguson *v.* Davis Co., 57 Ia. 601; Gronan *v.* Kukkuck, 59 Ia. 18; Stafford *v.* Oskaloosa, 64 Ia. 251; Kendall *v.* Albia, 73 Ia. 241; Tefft *v.* Wilcox, 6 Kas. 46; Kansas P. Ry. Co. *v.* Pointer, 9 Kas. 620; Missouri K. & T. Ry. Co. *v.* Weaver, 16 Kas. 456; Alexander *v.* Humber, 86 Ky. 565; Kentucky C. R.R. Co *v.* Ackley, 87 Ky. 278; Stockton *v.* Frey, 4 Gill 406; McMahon *v.* Northern C. Ry. Co., 39 Md. 438; Tyler *v.* Pomeroy, 8 All. 480; Smith *v.* Holcomb, 99 Mass. 552; Memphis & C. R.R. Co. *v.* Whitfield, 44 Miss. 466; West *v.* Forrest, 22 Mo. 344; Porter *v.* Hannibal & S. J. R.R. Co., 71 Mo. 66; Ridenhour *v.* Kansas C. C. Ry. Co., 13 S. W. Rep. 889 (Mo.); McMillan *v.* Union P. B. W., 6 Mo. App. 434; Holyoke *v.* Grand T. Ry. Co., 48 N. H. 541; Clark *v.* Manchester, 64 N. H. 471; Matteson *v.* New York C. R.R. Co., 62 Barb. 364; Brignoli *v.* Chicago & G. E. Ry. Co., 4 Daly 182; Wallace *v.* Western N. C. R.R. Co., 104 N. C. 442; Pennsylvania & O. C. Co. *v.* Graham, 63 Pa. 290; McLaughlin *v.* Corry, 77 Pa. 109; Scott *v.* Montgomery, 95 Pa. 444; Houston & T. C. Ry. Co. *v.* Boehm, 57 Tex. 152; Texas & P. Ry. Co. *v.* Curry, 64 Tex. 85; Bovee *v.* Danville, 53 Vt. 183; Richmond & D. R.R. Co. *v.* Norment, 84 Va. 167; Vinal *v.* Core, 18 W. Va. 1; Riley *v.* West V. C. & P. Ry. Co., 27 W. Va. 145; Goodno *v.* Oshkosh, 28 Wis. 300; Stewart *v.* Ripon, 38 Wis. 584.

3. *Mental anxiety and distress*, which, though the direct and natural result of the injury, are independent of it, are subjects of compensation (though, as has been seen, there are cases the other way). So where one was bitten by a dog suspected of being mad, he was allowed to recover for his fear of evil results,[a] and compensation has been recovered for anxiety caused by the non-arrival of a physician, a telegram summoning him not having been delivered, owing to the defendant's negligence.[b]

4. *Fright caused by apprehension of physical harm* is a subject of compensation.[c] Thus, where the plaintiff, put off the defendant's train wrongfully at night in a freight yard before reaching his station, fell into a culvert, and was frightened by trains backing over the culvert, he was allowed to recover for his fright.[d] So recovery is allowed for a shock to the nervous system.[e]

5. *Loss of peace of mind and happiness* is a subject of compensation.[f]

6. *Sense of insult or indignity, mortification, or wounded pride* is a subject of compensation.[g] A common instance is where a passenger is wrongfully ejected from a railroad train.[h] So, where the plaintiff was

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[a] Godeau *v.* Blood, 52 Vt. 251.

[b] W. U. Tel. Co. *v.* Cooper, 71 Tex. 507.

[c] L. & N. R.R. Co. *v.* Whitman, 79 Ala. 328. This is the ground of recovery in the actions of assault considered above.

[d] Stutz *v.* C. & N. W. Ry. Co., 73 Wis. 147.

[e] Kendall *v.* Albia, 73 Ia. 241.

[f] Cox *v.* Vanderkleed, 21 Ind. 164, and the cases of breach of promise of marriage above.

[g] Quigley *v.* C. P. R.R. Co., 5 Sawy. 107; Boyle *v.* Case, 9 Sawy. 386; Ward *v.* Blackwood, 48 Ark. 396.

[h] Coppin *v.* Braithwaite, 8 Jur. 875; Louisville & N. R.R. Co. *v.* Whitman, 79 Ala. 328; Head *v.* Georgia P. Ry. Co., 79 Ga. 358; Chicago & A. R.R. Co. *v.* Flagg, 43 Ill. 364; Chicago & N. W. Ry. Co. *v.* Williams, 55

wrongfully ejected from his house, it was held that he could recover compensation for mortification.(a) So the plaintiff may recover compensation for wounded pride in actions for malicious prosecution (b) or false imprisonment (c) or in an action for assault and battery committed in arresting the plaintiff illegally.(d)

On the same ground the plaintiff recovers in actions of libel and slander;(e) but when in an action of slander the words are not actionable in themselves, and special damage must be shown, recovery cannot be had for mental suffering alone.(f)

So where a plaintiff suffered bodily mutilation through the defendant's tort, he may recover compensation for mortification which he has suffered and will suffer by reason of the mutilation, and of the fact that he may be-

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Ill. 185; Chicago & N. W. Ry. Co. *v.* Chisholm, 79 Ill. 584; Pennsylvania R.R. Co. *v.* Connell, 112 Ill. 295; Lake E. & W. Ry. Co. *v.* Fix, 88 Ind. 381; Shepard *v.* Chicago, R. I. & P. Ry. Co., 77 Ia. 54; S. K. Ry. Co. *v.* Rice, 38 Kas. 308; Smith *v.* Pittsburgh, F. W. & C. Ry. Co., 23 O. S. 10; Stutz *v.* Chicago & N. W. Ry. Co., 73 Wis. 147. It is, however, held in some jurisdictions that if the conductor acted considerately, the plaintiff should have felt no sense of insult, and therefore that he can recover nothing for sense of indignity. Paine *v.* C., R. I. & P. Ry. Co., 45 Ia. 569; Fitzgerald *v.* C., R. I. & P. Ry. Co., 50 Ia. 79; Batterson *v.* C. & G. T. Ry. Co., 49 Mich. 184; but *contra*, Chicago & A. R.R. Co. *v.* Flagg, 43 Ill. 364; Carsten *v.* Northern P. Ry. Co., 47 N. W. Rep. 49 (Minn.).

(a) Moyer *v.* Gordon, 113 Ind. 282.

(b) Lunsford *v.* Dietrich, 86 Ala. 250; Parkhurst *v.* Masteller, 57 Ia. 474; Vinal *v.* Core, 18 W. Va. 1.

(c) Ross *v.* Leggett, 61 Mich. 445; Hays *v.* Creary, 60 Tex. 445.

(d) Morgan *v.* Curley, 142 Mass. 107.

(e) Swift *v.* Dickerman, 31 Conn. 285; Adams *v.* Smith, 58 Ill. 418; Prime *v.* Eastwood, 45 Ia. 640; Miller *v.* Roy, 10 La. Ann. 231; Dufort *v.* Abadie, 23 La. Ann. 280; Blumhardt *v.* Rohr, 70 Md. 328; Hastings *v.* Stetson, 130 Mass. 76; Mahoney *v.* Belford, 132 Mass. 393; Chesley *v.* Tompson, 137 Mass. 136; Scripps *v.* Reilly, 38 Mich. 10; Newman *v.* Stein, 75 Mich. 402; Barnes *v.* Campbell, 60 N. H. 27.

(f) Lynch *v.* Knight, 9 H. L. C. 577.

come an object of curiosity and ridicule among his fellows.([a])

7. *Sense of shame and humiliation* is a subject of compensation. So where a father brings an action for the seduction of his daughter, he may recover compensation for the shame it caused him; ([b]) and in jurisdictions where, by statute, the woman may recover for her seduction, her shame is an element of compensation.([c]) In an action for indecent assault, the woman may recover compensation for her sense of shame and humiliation; ([d]) so may the plaintiff in an action for the unlawful execution of a search warrant.([e])

So where a physician brought with him a layman to help him deliver the plaintiff of a child, and they were admitted upon the supposition that both were physicians, it was held that the plaintiff, on learning the truth, might recover compensation from the physician for her sense of shame.([f]) And where a female passenger was kissed by a conductor, it was held that she could recover compensation for her sense of humiliation.([g])

8. *A blow to the affections* is a subject for compensation, as in case of breach of promise of marriage. Compensation is awarded for this cause in those jurisdictions which permit recovery for the grief caused by non-deliv-

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([a]) Heddles *v.* Chicago & N. W. Ry. Co., 46 N. W. Rep. 115 (Wis.); *acc.* Sherwood *v.* Chicago & W. M. Ry. Co., 46 N. W. Rep. 773 (Mich.).

([b]) Barbour *v.* Stephenson, 32 Fed. Rep. 66; Hatch *v.* Fuller, 131 Mass. 574; Russell *v.* Chambers, 31 Minn. 54; Lunt *v.* Philbrick, 59 N. H. 59; Riddle *v.* McGinnis, 22 W. Va. 253.

([c]) Simons *v.* Busby, 119 Ind. 13; Breon *v.* Henkle, 14 Ore. 494, 500; Giese *v.* Schultz, 53 Wis. 462; 65 Wis. 487.

([d]) Campbell *v.* Pullman P. C. Co., 42 Fed. Rep. 484; Wolf *v.* Trinkle, 103 Ind. 355; Fay *v.* Swan, 44 Mich. 544; Ford *v.* Jones, 62 Barb. 484.

([e]) Melcher *v.* Scruggs, 72 Mo. 407.

([f]) De May *v.* Roberts, 46 Mich. 160.

([g]) Craker *v.* C. & N. W. Ry. Co., 36 Wis. 657.

ery of a telegram announcing the illness or death and funeral of a relative.

§ 48. **Compensation for injuries to family relations.**— The relations existing between the members of a family are protected by the common law, and for injuries to such relations compensation may be had: thus, damages may be recovered for the loss by a husband or wife of the *consortium* of the other, and by a parent for the society and services of his child. In such cases there is injury independent of pecuniary loss; indeed, recovery may be had though there is no pecuniary loss.

The right of a husband to the *consortium* of his wife includes not only a right to the services of the wife, but also to her affection, comfort, and fellowship, and to an undefiled marriage-bed. A husband has therefore been allowed to recover damages for a rape on his wife, though their relations were uninterrupted and her household services continued to be performed,(a) and for alienating the affections of his wife, though she continued to live with him.(b) And a father, suing for the seduction of his daughter, may recover compensation for "loss of society of a virtuous daughter," (c) and for the "destruction of his domestic peace." (d)

So in an action for malicious prosecution, it was held that the plaintiff could recover compensation for the loss of society of his family.(e)

§ 49. **To personal liberty.**—For an illegal restraint of the plaintiff's personal liberty compensation may be re-

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(a) Bigaouette *v.* Paulet, 134 Mass. 123.
(b) Heermance *v.* James, 47 Barb. 120.
(c) Russell *v.* Chambers, 31 Minn. 54.
(d) Kendrick *v.* McCrary, 11 Ga. 603.
(e) Hamilton *v.* Smith, 39 Mich. 222.

covered.[a] This is something different from either the loss of time or the physical injury or mental suffering caused by the imprisonment. It is of the same general character as the latter, and the measurement of the compensation must necessarily be left entirely to the jury.

§ 50. **To reputation and standing in society.**—For an injury to the plaintiff's reputation, honor, and standing in society, caused by the defendant's wrongful act, compensation may be recovered.[b] So, in a case of indecent assault, the court said the plaintiff could recover compensation for "loss of honor and good name."[c] The same decision was made where the defendant wrongfully entered the plaintiff's premises with the avowed purpose of searching for stolen money.[d] And where the plaintiff and his family were wrongfully turned into the street, it was held that he could be compensated for "injury to his pride and social position."[e]

A plaintiff may also recover compensation if prevented from gaining an advantage in worldly position. Thus, in an action for breach of promise of marriage, the plaintiff may recover damages for "loss of station."[f] And so where the defendant's defamation has deprived the plaintiff of a marriage, the plaintiff may recover compensation for the "advantages" of it.[g]

§ 51. **Aggravation and mitigation.**—In all actions where the damages are not capable of exact pecuniary measure-

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[a] Fotheringham *v.* Adams Ex. Co., 36 Fed. Rep. 252; Hamilton *v.* Smith, 39 Mich. 222.

[b] Barnes *v.* Martin, 15 Wis. 240; and in all actions for defamation.

[c] Wolf *v.* Trinkle, 103 Ind. 355; so in an action for seduction, Hawn *v.* Banghart, 76 Ia. 683; Breon *v.* Henkle, 14 Ore. 494, 500.

[d] Anon., Minor, 52.

[e] Moyer *v.* Gordon, 113 Ind. 282.

[f] Kelly *v.* Renfro, 9 Ala. 325.

[g] Davis *v.* Gardiner, 4 Co. 16*b*.

ment—that is, where the amount is to a certain extent within the control of the jury—all circumstances may be shown in evidence which will in any way assist the jury in forming its estimate of the amount of damages. In all cases where the amount of damages depends upon the effect of the injury on the feelings, the circumstances of the injury and the position in life of the parties have a bearing on the amount which should be awarded as compensation. So in the case of an injury to liberty, to family relations, to reputation and social standing. And where exemplary damages are to be given, such circumstances have great bearing on the defendant's malice, and may be shown in evidence for the purpose of increasing or decreasing the exemplary damages. Circumstances shown by the plaintiff for the purpose of increasing the amount either of compensatory or of exemplary damages are said to be shown in *aggravation* of the damages; circumstances shown by the defendant for the purpose of cutting down the amount allowed as damages are said to be shown in *mitigation*. These terms, often misused, are properly applied only where evidence is presented to the jury for the purpose of affecting its estimate of damages in this class of cases.

§ 52. **Matter of evidence, not of law.**—It will be observed that matters of aggravation or mitigation are properly matters of evidence only; and it is not really a question of law whether or not a circumstance is one of aggravation or mitigation. In fact, it is easily conceivable that a circumstance that would aggravate the damages in one case would mitigate them in another. Even in the same form of action the same circumstance might be in one instance an aggravation, in another a mitigation of the injury. In an action of slander the high position of the plaintiff usually aggravates the damages, since it

puts an unusually high value on the reputation injured; but it has been held to be a matter of mitigation if the plaintiff's character were so high as to be above the reach of the slander.([a])

The court is called upon to decide whether evidence offered by a party is admissible in his favor, either in aggravation or in mitigation. But counsel for the other party might desire to argue before the jury that the evidence offered in aggravation should really be considered by the jury as a matter of mitigation, or *vice versa*. It seems that in fairness this privilege should be allowed him, on the same principle that he is allowed to argue that the evidence is not of any weight at all. But if so, the court would not be justified in charging that the evidence *must* be taken in one way or the other; to do so would be to take from the jury the decision of a controverted question of fact. It would, therefore, seem that, in any case where the effect of evidence admitted is reasonably contested by the parties, the court should not charge in favor of either side, but should leave the matter to the jury. It is rarely, however, a matter of any doubt whether a circumstance tends to mitigate or aggravate damages, and in the ordinary case the court is justified in charging that certain facts are to be considered by the jury in aggravation or mitigation.

The question, in short, is one as to the admissibility and effect of evidence, and not strictly one as to the legal measure of damages. Nevertheless, certain rules as to the effect of some common circumstances (such as provocation, good faith, the position of the parties, etc.) in aggravating or mitigating the damages have been laid down, and are followed in ordinary cases; though, as has

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([a]) Broughton *v.* McGrew, 39 Fed. Rep. 672.

been said, they should not be regarded as conclusive. These rules are applied in actions of breach of promise of marriage and of tort for personal injury, and in all actions where exemplary damages are allowed, and will be stated and discussed in connection with those actions.

Reduction of the Original Loss.

§ 53. **Offer of specific reparation.**—A court of law cannot, as has been seen, decree specific reparation for a wrong; nor can it require the injured party to accept such reparation in lieu of damages. The right to damages is absolute upon the happening of the wrong, and nothing but the act of the injured party can release it. Consequently an offer of specific reparation, unaccepted, will not reduce the plaintiff's damage. For instance, the plaintiff is not obliged to receive converted property which the defendant desires to return.(a) And of course the plaintiff cannot be obliged to buy back his property, though offered to him at less than the market price,(b) nor to accept other property in lieu of that converted.(c) So in an action of trover (d) it was said: "No tender or offer to restore the property after conversion, will defeat the action or mitigate the damages. If the injured party accept the property when tendered, this may be shown in mitigation of damages, but will not defeat the action entirely. Nor will a mere agreement without consideration to receive the property, defeat the action or mitigate the damages where the injured party thinks

(a) Norman *v.* Rogers, 29 Ark. 365; Carpenter *v.* Dresser, 72 Me. 377; Stickney *v.* Allen, 10 Gray 352; Bringard *v.* Stellwagen, 41 Mich. 54; Livermore *v.* Northrup, 44 N. Y. 107; Carpenter *v.* Manhattan Life Ins. Co., 22 Hun 47; Green *v.* Sperry, 16 Vt. 390; Morgan *v.* Kidder, 55 Vt. 367.

(b) Weld *v.* Reilly, 48 N. Y. Super. Ct. 531.

(c) Munson *v.* Munson, 24 Conn. 115; Woods *v.* McCall, 67 Ga. 506.

(d) Norman *v.* Rogers, 29 Ark. 365, 369.

proper to disregard the agreement and bring his suit for the conversion."

And if a contract to marry is broken, a subsequent offer to marry will not mitigate the damage.([a])

§ 54. **Bringing converted property into court.**—The practice of staying proceedings in certain cases upon bringing converted property into court was not unknown in England. The question was early considered by Lord Mansfield,[1] where a motion was made to stay proceedings on bringing the chattel into court, with costs to that time. The rule was refused on the circumstances of the particular case; but his lordship said:

"Where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court; where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule thereby to estimate the additional value, then it shall not be brought in." The case of Whitten *v.* Fuller[2] was a motion by defendant, in an action of trover for a bond, to have proceedings stayed on delivering up the bond and paying costs. But the plaintiff objecting, that he had sustained great loss by the detention of the bond till after the death of the obligor, and insisting on his right to go for special damages, the motion was denied.

[1] Fisher *v.* Prince, 3 Burr. 1363.

[2] 2 W. Black 902.

([a]) Kurtz *v.* Frank, 76 Ind. 594; Bennett *v.* Beam, 42 Mich. 346; *contra* Kelly *v.* Renfro, 9 Ala. 325.

This practice of staying proceedings, though known in England much later than the time of Lord Mansfield,[1] is little known in this country.[2] In Stevens *v.* Low,[3] Cowen, J., said, however: "It is quite common for the courts to make a rule stopping the action on a redelivery and payment of costs." The reports of our decisions would not seem to warrant the remark; but the practice seems still to prevail in Vermont.([a])

§ 55. **Reparation accepted.**—Where, however, the injured party accepts reparation, it operates as a reduction of damages. Thus where goods wrongfully taken from the owner are returned to him and accepted, damages are reduced by the value of the goods when accepted.([b]) The same rule applies in actions of contract. Thus where machinery sold by the defendant to the plaintiff was not delivered in good condition, evidence that the plaintiff allowed the defendant after delivery to remedy

[1] Earle *v.* Holderness, 4 Bing. 462; Tucker *v.* Wright, 3 Bing. 601; Gibson *v.* Humphrey, 1 Cr. & M. 544.

[2] Shotwell *v.* Wendover, 1 Johns. 65.

[3] 2 Hill 132.

([a]) Rutland & W. R.R. Co. *v.* Bank of Middlebury, 32 Vt. 639; Bucklin *v.* Beals, 38 Vt. 653 (*semble*).

([b]) Actions of trover: Willoughby *v.* Backhouse, 2 B. & C. 821; Bayliss *v.* Fisher, 7 Bing. 153; S. C. 4 M. & P. 790; Moon *v.* Raphael, 2 Bing. N. C. 310; Bates *v.* Clark, 95 U. S. 204; Renfro *v.* Hughes, 69 Ala. 581; Murphy *v.* Hobbs, 8 Col. 17; Cook *v.* Loomis, 26 Conn. 483; Lazarus *v.* Ely, 45 Conn. 504; Barrelett *v.* Bellgard, 71 Ill. 280; Long *v.* Lambkin, 9 Cush. 361; Lucas *v.* Trumbull, 15 Gray, 306; Delano *v.* Curtis, 7 All. 470; Perham *v.* Coney, 117 Mass. 102; Hackett *v.* B. C. & M. R.R. Co., 35 N. H. 390; Gove *v.* Watson, 61 N. H. 136; McFadden *v.* Whitney, 51 N. J. L. 391; Bowman *v.* Teall, 23 Wend. 306; McCormick *v.* P. C. R.R. Co., 80 N. Y. 353; Dailey *v.* Crowley, 5 Lans. 301; Yale *v.* Saunders, 16 Vt. 243.

Actions of trespass: Gibbs *v.* Chase, 10 Mass. 125; Kaley *v.* Shed, 10 Met. 317 (*semble*); Vosburgh *v.* Welch, 11 Johns. 175; Hanmer *v.* Wilsey, 17 Wend. 91; Hibbard *v.* Stewart, 1 Hilt. 207.

Actions of replevin: Conroy *v.* Flint, 5 Cal. 327; Dewitt *v.* Morris, 13 Wend. 496.

the defect is admissible to reduce damages.(a) But in any case nominal damages at least may be recovered.[1] When the goods taken are inclosed in boxes, the mere opening of the boxes subsequently by the owner, to enable a witness to appraise the value of the goods, is not such a resumption of the property as will justify a mitigation of damages.[2]

§ 56. **Reparation preventing actual loss.**—In some cases the reparation has absolutely prevented the happening of damage from the injury. In such cases this is allowed to be shown, not, properly speaking, in reduction of damages, but in proof of the actual amount of damages. Acceptance by the injured party need not be shown, for no right ever accrued to him to recover more than the original and actual loss. In Dow *v.* Humbert (b) the defendants, supervisors of a town, being sued for refusing to put two judgments of the plaintiff on the tax list, were allowed to show in mitigation that they were subsequently placed on the list. So where a lien was discharged and the discharge enured to the benefit of the plaintiff, the amount paid may be deducted.(c) Where the grantor of land bought in an outstanding incumbrance, the grantee, not having been actually injured by

[1] The language of the oldest authority on this point is as follows: "Si home prist mon cheval et ceo chevaucha et puis ceo redeliver al moy uncore jeo poio aver cest action vers luy; car ceo est un convercion, et le redelivery nest ascun barr del action mes solement serra un mitigacion de damages. *Per* Cur, in the Countess of Rutland's Case, 1 Roll. Abr. 15.

Baldwin *v.* Cole, 6 Mod. 212; 5 Bac. Ab. Trover, D. § 39; Esp. N. P. 190, 191; Cook *v.* Hartle, 8 Car. & Payne, 568. So, in Murray *v.* Burling, 10 Johns. 172, Thompson, J., said: "It is every day's practice to sustain this action for the injury suffered, although the owner has repossessed himself of his property." And the same point was held in Reynolds *v.* Shuler, 5 Cowen, 323.

The same has been held in Massachusetts. Wheelock *v.* Wheelright, 5 Mass. 104; Gibbs *v.* Chase, 10 Mass. 125; Greenfield Bank *v.* Leavitt, 17 Pick. 1.

[2] Connah *v.* Hale, 23 Wend. 462.

(a) Marsh *v.* McPherson, 105 U. S. 709.

(b) 91 U. S. 294.

(c) Stollenwerck *v.* Thacher, 115 Mass. 224.

the incumbrance, could recover only nominal damages.[a] Such a case was Hartford and Salisbury Ore Co. *v.* Miller,[b] an action for breach of covenant of seisin contained in a deed purporting to convey certain mineral rights which the defendant in fact could not convey, not having the consent of his co-tenants. They afterwards consented, so that the plaintiffs acquired the same rights which they would have had if there had been no breach; and it was held that the plaintiff could only recover nominal damages.

In an action for the diversion of a watercourse, the fact that part of the water diverted was returned to the stream above the plaintiff's land was to be considered in estimating the amount of damages.[c]

§ 57. **Reparation by a third party.**—Reparation, not by the wrong-doer, but by a stranger, will reduce the damages if it was accepted by the injured party or was of a nature to prevent loss. So, where, by the defendant's procurement, the plaintiff's wife had left the plaintiff, taking a quantity of his personal property, but afterwards returned to the vicinity of his house, and delivered to him the baggage checks given by the railway for his goods, so that these came under his control, it was held that this delivery should go in reduction of his damages, and a verdict for the full value of the property was held wrong.[d]

Where goods were misdelivered by a carrier, the latter may show in reduction of damages that the owner has accepted compensation from the person to whom they were delivered.[e] Similarly, in a suit on an adminis-

[a] McInnis *v.* Lyman, 62 Wis. 191. [b] 41 Conn. 112.
[c] Mannville Co. *v.* Worcester, 138 Mass. 89.
[d] Dailey *v.* Crowley, 5 Lans. 301.
[e] Rosenfield *v.* Express Co., 1 Woods 131; Jellett *v.* St. P., M. & M. Ry. Co., 30 Minn. 265.

trator's bond for failure to account for the proceeds of a sale of property, it may be shown in reduction of damages that payment has been made by the purchaser to the administrator *de bonis non.*[a] And so in an action by a sheriff on a bond indemnifying him from damage in levying execution, where he had been required to pay $1,600 in a suit by the owner for conversion, it was held that the sureties could show, in mitigation of damages, that he had received $1,000 on a sale of the goods, for his injury was the difference between those sums.[b]

Where an action is brought against one of two joint tortfeasors, it may be shown in reduction of damages that the other tortfeasor has made part compensation.[c]

§ 58. **Recovery of property by the injured party.**—If the owner has recovered property taken from him by the wrong-doer, that fact will reduce the damages; but the owner is allowed compensation for his expenditure in recovering the property.[d] Thus where the plaintiff's property was seized and sold by the defendant, a sheriff, and was repurchased by the plaintiff from the one who bought it at the sheriff's sale, it was held that the meas-

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[a] Probate Court *v.* Bates, 10 Vt. 285.

[b] O'Brien *v.* McCann, 58 N. Y. 373.

[c] Burn *v.* Morris, 2 C. & M. 579; Knapp *v.* Roche, 94 N. Y. 329.

[d] Tamvaco *v.* Simpson, 19 C. B. (N. S.) 453; Ewing *v.* Blount, 20 Ala. 694; Baldwin *v.* Porter, 12 Conn. 473; Merrill *v.* How, 24 Me. 126; Alexander *v.* Helber, 35 Mo. 334; Ford *v.* Williams, 24 N. Y. 359; McDonald *v.* North, 47 Barb. 530; Sprague *v.* McKinzie, 63 Barb. 60; Vedder *v.* Van Buren, 14 Hun 250; Hough *v.* Bowe, 51 N. Y. Super. Ct. 208; Forsyth *v.* Palmer, 14 Pa. 96; McInroy *v.* Dyer, 47 Pa. 118; Hurlburt *v.* Green, 41 Vt. 490; Chase *v.* Snow, 52 Vt. 525; Johannesson *v.* Borschenius, 35 Wis. 131; Sprague *v.* Brown, 40 Wis. 612. But it was held in Vermont, in an action of trover for a pair of oxen, which had been stolen from the plaintiff, and were found in the defendant's possession in New York, that the expenses incurred by the plaintiff in regaining possession of the cattle, by legal process in New York, could not be included in the damages recoverable for the conversion. Harris *v.* Eldred, 42 Vt. 39.

ure of damages was the amount paid to repurchase the property.(a) Where the defendant secured a loan from the plaintiff by fraud, and was sued for the fraud, it was held that the amount of a judgment previously obtained by the plaintiff in an action to recover the money loaned should be deducted from the compensation given for the fraud.(b) So in an action for breaking into the plaintiff's house and removing his furniture, the amount of a judgment for the value of the use of the furniture, recovered by the plaintiff in a replevin suit previously brought by him against the defendant, is to be recovered.(c)

§ 59. **Application of property to the benefit of the injured party.**—The rules are the same where the defendant attempts to show not that he has made specific reparation, but that he has applied the proceeds of his wrong to the benefit of the injured party. The injured party has ordinarily the right to refuse to accept such application, and in that case, if he does refuse, there can be no reduction of damages.(d) So a sheriff who wrongfully levied upon and sold the goods of the plaintiff, cannot show, in mitigation of damages, that he has applied the proceeds of the sale to the payment of a debt of the plaintiff.(e)

So a defendant cannot show that he has paid the plaintiff's note with the proceeds of the converted property.(f)

If the injured party consents to the application, it

(a) Dodson *v.* Cooper, 37 Kas. 346; Felton *v.* Fuller, 35 N. H. 226; Winburne *v.* Bryan, 73 N. C. 47; McInroy *v.* Dyer, 47 Pa. 118.

(b) Whittier *v.* Collins, 15 R. I. 90.

(c) Briggs *v.* Milburn, 40 Mich. 512.

(d) Torry *v.* Black, 58 N. Y. 185.

(e) Parham *v.* McMurray, 32 Ark. 261; Dallam *v.* Fitler, 6 W. & S. 323; M'Michael *v.* Mason, 13 Pa. 214.

(f) Northrup *v.* McGill, 27 Mich. 234.

may be shown in reduction of damages.(a) Thus, in Torry *v.* Black,(b) the defendant had unlawfully cut timber from the plaintiff's land. It was held that he might show, in mitigation of damages, that he had, with the assent of the infant's guardian, applied part of the proceeds to the payment of taxes upon and debts against the infant's estate, but could not show payments made without such consent. Grover, J., said: "A trespasser cannot mitigate the damages by an offer to return the property to its owner; but if the owner accept the property, or otherwise regains possession of it, it may be proved for that purpose, as in that case he is not deprived of his property. The inquiry is, what is the amount of damage sustained by the plaintiff from the wrongful act of the defendant. But to warrant this evidence, the property must be received by the plaintiff or applied to his use with his assent. The law will not permit a wrong-doer to take the property of another and apply the same to his use without his assent, and if so applied, the damages recoverable for the injury will not be thereby affected. When the owner voluntarily receives the proceeds of the property wrongfully taken or directs or assents to their application to his use, such facts may be shown in mitigation, the same as the receipt or application of the identical property taken by the trespasser."

§ 60. **Application authorized by law—Seizure on execution, etc.**—In certain cases the injured party cannot object to the application made of the property; in such cases the property is to be considered as returned to him,(c) and damages will be reduced, not by the actual proceeds of

(a) Bringard *v.* Stellwagen, 41 Mich. 54; Doolittle *v.* McCullough, 7 Oh. St. 299.

(b) 58 N. Y. 185.

(c) Kaley *v.* Shed, 10 Met. 317.

the property, as would be the case if the doctrine of recoupment were invoked, but by the value of the property thus applied. In other words, no damages can be recovered, in the absence of special circumstances, for the original taking of property afterwards so applied.[a]

Thus where goods in the possession of a wrong-doer are seized by a sheriff on a writ against the owner, sold, and the proceeds applied to discharge the owner's debt, the damages recoverable against the wrong-doer for conversion of the goods will be reduced by the value of the goods.[b] In some States this may be done even when the process was in favor of the wrong-doer himself;[c] but the better view is that to enable the wrong-doer to obtain a reduction of damages the process must be in favor of a third person.[d] So in Edmondson *v.* Nuttall,[e] Willes, J., said: "Subsequently to the conver-

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[a] Unless the property is sold for less than its value: Empire Mill Co. *v.* Lovell, 77 Ia. 100; Ward *v.* Benson, 31 How. Pr. 411.

[b] Lazarus *v.* Ely, 45 Conn. 504; Perkins *v.* Freeman, 26 Ill. 477; Bates *v.* Courtwright, 36 Ill. 518; Howard *v.* Manderfield, 31 Minn. 337; Beyersdorf *v.* Sump. 39 Minn. 495; Howard *v.* Cooper, 45 N. H. 339; Ball *v.* Liney, 48 N. Y. 6; Wehle *v.* Spelman, 25 Hun 99; Parker *v.* Connor, 44 N. Y. Super. Ct. 416; Morrison *v.* Crawford, 7 Ore. 472; Mayer *v.* Duke, 72 Tex. 445; Stewart *v.* Martin, 16 Vt. 397; Montgomery *v.* Wilson, 48 Vt. 616.

[c] Curtis *v.* Ward, 20 Conn. 204; Lazarus *v.* Ely, 45 Conn. 504; Hopple *v.* Higbee, 23 N. J. L. 342; Morrison *v.* Crawford, 7 Ore. 472; Mayer *v.* Duke, 72 Tex. 445.

[d] Stickney *v.* Allen, 10 Gray 352; Beyersdorf *v.* Sump, 39 Minn. 495; Otis *v.* Jones, 21 Wend. 394; Higgins *v.* Whitney, 24 Wend. 379; Sherry *v.* Schuyler, 2 Hill 204; Ball *v.* Liney, 48 N. Y. 6; Wehle *v.* Butler, 61 N. Y. 245; Wehle *v.* Spelman, 25 Hun 99. But where a sale of goods was made by a debtor in violation of the State insolvent laws, and the goods, while in the purchaser's hands, were attached by a creditor, who held them till the institution of proceedings in insolvency and choice of an assignee, and then delivered them to the assignee; these facts were allowed in mitigation, in an action of tort brought by the purchaser against the attaching creditor. Leggett *v.* Baker, 13 Allen, 470.

[e] 34 L. J. (C. P.) 102, 104. In the regular reports this language is not found, but the substance of it is given: 17 C. B. (N. S.) 280.

sion the defendant acquired a right to the goods, but this is a right which he could not have exercised but for a wrongful act of his own in taking possession of the goods, and it would be against the plainest principles to allow a man to take advantage of his own wrong."

§ 61. **Informal sale after legal seizure.**—Where there is an informal sale by one who has rightfully seized the plaintiff's property under authority of law, but by the informality becomes a trespasser *ab initio*, the case is different. There is no return of the goods in that case either to the owner or to his use; and the defendant is obliged to rely upon the principle that he is legally discharging the plaintiff's debt. The damages are reduced, therefore, not by the value of the goods seized, but by the amount of the debt paid. So in the case of an illegal distress without the statutory appraisement required, it was intimated that the measure of damages would be the difference between the fair value of the goods and the amount of rent discharged by the proceeds of the sale.(a) So where goods were seized by a tax-collector, for non-payment of taxes, but a subsequent irregularity rendered all the proceedings void, the collector was held liable for the value of the goods less the amount applied to the payment of the tax.(b)

Where a sheriff rightfully seized property on execution, but wrongfully sold it without due notice, it was held that though he became a trespasser *ab initio*, yet he might show his authority in mitigation of damages; and that damages would be reduced to the increase of price

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(a) Wilson *v.* Nightingale, 8 Q. B. 1034 (*semble*); Biggins *v.* Goode, 2 Cr. & J. 364; Proudlove *v.* Twemlow, 1 Cr. & M. 326; Knight *v.* Egerton, 7 Ex. 407; Mickle *v.* Miles, 1 Grant 320.

(b) Cressey *v.* Parks, 76 Me. 532.

that would have been obtained if due notice of the sale had been given.(a)

So in the case of an executor *de son tort*, who is liable for the value of goods appropriated by him, it was long ago held by Lord Holt, that although "he cannot plead payment of debts, etc., to the value, etc., or that he hath given the goods, etc., in satisfaction of the debts, ... nevertheless, upon the general issue pleaded, such payments shall be recouped in damages." (b) But where an officer, by selling the attached property unlawfully, had become a trespasser *ab initio*, and it did not appear that judgment had been, or would be, rendered in the original suit, and the proceeds of the sale of the attached property applied on the execution, the defendant was held not entitled to a reduction of damages.(c)

§ 62. **Reparation which would prevent further loss.**—If the reparation offered would prevent further loss, the injured party is bound to accept it. This is, however, not a reduction of damages for a loss already inflicted, but rather a prevention of future loss, and it will be discussed later as part of the subject of Avoidable Consequences.

§ 63. **Benefit conferred on the injured party by the wrongful act.**—If the wrongful act of the defendant at once confers a benefit and inflicts an injury, the loss actually caused will be the net result of the act to the plaintiff; and this net result will be the measure of damages. Thus, where the defendant placed earth on the plaintiff's land, the damages will be measured by the actual damage caused to the land from having the earth there. In

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(a) Wright *v.* Spencer, 1 Stew. 576.

(b) Whitehall *v.* Squire, Carthew 103, *acc.* Mountford *v.* Gibson, 4 East. 441, 447; Carpenter v. Going, 20 Ala. 587; Saam *v.* Saam, 4 Watts 432; Cook *v.* Sanders, 15 Rich. 63.

(c) Ross *v.* Philbrick, 39 Me. 29.

Mayo *v.* Springfield,[a] Field, J., said: "In determining the extent of the injury to the plaintiff's land, the court had a right to consider the benefits, if any, arising from placing the earth upon the land. An allowance for such benefits is not in the nature of recoupment or set-off, but a method of determining the actual damages sustained."

In an action against a railroad for a nuisance caused by running its tracks near the plaintiff's land, and thereby incommoding his business, the defendant was allowed to reduce damages by showing that the plaintiff could carry on his business to greater advantage in certain respects on account of the railroad.[b]

§ 64. **In an action for flooding lands.**—There is some conflict of authority on the question whether in an action for flooding lands the defendant can be allowed for benefit, if any, caused by the flowing. All allowance for benefit was denied in Gerrish *v.* The New Market Mfg. Co.[c] But in Massachusetts, in an action for damages occasioned by the filling up by the defendants of their land lying adjacent to that of the plaintiff, whereby the free flow of water off the plaintiff's land as formerly existing had been obstructed, it was held that instructions to the jury, that "they should take into consideration the evidence on both sides bearing on this point, and if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular, they would, in assessing the damages, make an allowance for such benefit, and give the plaintiff such sum in damages as they found upon the evidence would fully indemnify and

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[a] 138 Mass. 70; *acc.* Schroeder *v.* De Graff, 28 Minn. 299; Murphy *v.* Fond du Lac, 23 Wis. 365.

[b] Jeffersonville, M. & I. R.R. Co. *v.* Esterle, 13 Bush 667.

[c] 30 N. H. 478; acc. Tillotson *v.* Smith, 32 N. H. 90.

compensate him for all the damages he had actually sustained," were correct.(a) So where the defendant at first erected a dam which benefited the plaintiff's property, and the subsequent heightening of the dam caused the injury, it was said that the benefits should be deducted, and therefore, that the value of the plaintiff's property before any dam had been erected would be the standard, and not the value before the heightening.(b) The Massachusetts rule seems to be somewhat restricted by late decisions. The allowance must be confined to benefits resulting from the overflow itself, and does not include those incidentally received from the defendant's operations in other respects. So the benefit to the complainant's land by being drained by a ditch made by the respondent on his own land to draw water from a pond to the projected dam, cannot be offset against the damage caused by the overflow of the dam after its erection.(c) So where a riparian proprietor, by obstructing a river and thereby setting back the water, becomes liable to a mill owner for the injury sustained, he cannot, in an action by the injured party, offset the benefit to the plaintiff's lands by the removal of obstructions in the river at another time and place.(d) Benefit from the neighborhood of a mill cannot be considered in an action for flooding land.(e) Where in consequence of the wrongful construction of a railway embankment the plaintiff's lands were flooded, but would have been flooded in a lesser degree had the embankment not been constructed, the

(a) Luther *v.* Winnisimmet Co., 9 Cush. 171; *acc.* Imboden *v.* Etowah & B. B. Co., 70 Ga. 86, 116; Brower *v.* Merrill, 3 Chand. (Wis.) 46.

(b) Howe *v.* Ray, 113 Mass. 88.

(c) Gile *v.* Stevens, 13 Gray 146.

(d) Talbot *v.* Whipple, 7 Gray 122.

(e) Marcy *v.* Fries, 18 Kas. 353.

measure of damages was held to be the difference between the two amounts of damage.([a])

§ 65. **On the injured party in common with others.**—But even where the value of a benefit would be deducted, it has been held that the value of one which accrues to many others with the plaintiff, cannot. Kellogg *v.* Malin ([b]) was an action on a covenant against incumbrances, the incumbrance being a right of way in a railroad corporation over part of the land. It was held that the defendant could not show that the railroad raised the value of all land thereabouts, including the plaintiff's, for that was a common benefit.([c])

So in an action for maintaining a nuisance, the nuisance being a factory, the defendant was not allowed to show, in reduction of damages, that the rental value of the plaintiff's premises was increased by the increase of population, that increase consisting of employees of the defendant.([d]) This qualification applies generally to benefits which, by statute, are allowed to be set off. The allowance of benefits in condemnation proceedings is governed by special rules hereafter to be considered.

§ 66. **Not caused directly by the wrongful act itself.**—If the benefit is not caused by the wrongful act itself, the defendant cannot claim a reduction of damages on account of it.([e]) So the benefit to the plaintiff's land by being drained by a ditch dug by the defendant to draw water from a certain pond to his dam will not reduce the damages recoverable by the plaintiff for injury caused by

([a]) Workman *v.* Great N. Ry. Co. 32 L. J. Q. B. 279; St. Louis, I. M. & S. Ry. Co. *v.* Morris, 35 Ark. 622; Stewart *v.* Schneider, 22 Neb. 286.

([b]) 62 Mo. 429.

([c]) Acc. Gilbert *v.* S. G. & N. A. Ry. Co., 69 Ga. 396; Martinsville *v.* Shirley, 84 Ind. 546; Koestenbader *v.* Peirce, 41 Ia. 204; Marcy *v.* Fries, 18 Kas. 353; Jeffersonville M. & I. R. R. Co. *v.* Esterle, 13 Bush 667.

([d]) Francis *v.* Schoellkopf, 53 N. Y. 152.

([e]) Burcky *v.* Lake, 30 Ill. App. 23.

the overflow of the dam.(a) Nor can the defendant in an action for obstructing a watercourse show that he removed obstructions at another time and place.(b) Nor can the defendant in an action for injuring the plaintiff's land take advantage of a benefit conferred on other land of the plaintiff.(c) A defendant in an action for the seduction of the plaintiff's daughter cannot prove in reduction of damages presents or money given by him to the daughter,(d) or the amount of a judgment recovered against him by the daughter for the same act.(e)

Nor can benefits only indirectly caused by the wrongful act be shown to reduce damages. In an English case, by the defendant's delay in discharging a vessel the plaintiffs lost profits in the loss of the passage-money of emigrants who were booked to sail in her. Some of the plaintiffs were part owners of another vessel which derived a benefit by receiving these emigrants; but it was held that the plaintiffs' damages could not be reduced at all by these profits.(f)

In an action for failure to accept a certain number of bricks manufactured by the plaintiff, the defendant cannot show that the plaintiff, at the time fixed for delivery, sold bricks at a higher price than the defendant was to pay; for as many bricks might have been sold at the higher price, even if the defendant had received the bricks he contracted for.(g) So where, through the

(a) Gile *v.* Stevens, 13 Gray 146.

(b) Talbot *v.* Whipple, 7 Gray 122.

(c) Gerrish *v.* New Market Manuf. Co., 30 N. H. 478.

(d) Russell *v.* Chambers, 31 Minn. 54.

(e) Pruitt *v.* Cox, 21 Ind. 15; Sellars *v.* Kinder, 1 Head 134.

(f) Jebsen *v.* E. & W. Ind. Dock Co., L. R. 10 C. P. 300; *acc.* Coffin *v.* The Osceola, 34 Fed. Rep. 921. *Contra*, Leathers *v.* Sweeney, 41 La. Ann. 287. The English case was decided on the analogy of the cases discussed in the next section.

(g) Canda *v.* Wick, 49 N. Y. Super. Ct. 497.

master's wrongful act, the delivery of a cargo of sugar was delayed and part of the sugar lost by leakage, it was held that the master could not reduce the damages recovered for the sugar that was lost by showing that during the delay the market price of sugar had increased.([a])

The defendant, in examining the title to land for the plaintiff, negligently failed to find an incumbrance. The plaintiff took a mortgage on the land, and in order to protect his mortgage was obliged to buy the land at a sale made to satisfy the prior incumbrance. The value of the land advanced so much that the plaintiff, before bringing this action, had sold it for more than he had paid out in all; but it was held that this fact could not be shown in reduction of damages.([b]) So where the plaintiff, a lessee of the defendant, was obliged, in order to protect his possession, to take out a new lease from the holder of the paramount title, it was held in an action on the covenant for quiet enjoyment that the defendant could not show, in reduction of damages, that the plaintiff had sold his new lease at a profit.([c])

§ 67. **Benefit received from third parties on account of the injury.**—Damages cannot be reduced by an amount which the plaintiff may have received from third parties, acting independently of the defendant, though it is given to the plaintiff on account of the injury. For it is given either as a pure gift, not intended by the giver to be in lieu of damages, or else it is given in performance of a contract, the consideration of which was furnished by the plaintiff. In neither case has the defendant any equitable or legal claim to share in the benefit.

([a]) Elwell *v.* Skiddy, 77 N. Y., 282; acc. Morrison *v.* Florio S.S. Co., 36 Fed. Rep. 569.

([b]) Harrison *v.* Brega, 20 Up. Can. Q. B. 324.

([c]) Fitzgibbons *v.* Freisem, 12 Daly 419.

So no reduction of damages is made because of any charitable aid the plaintiff has received on account of the injury.[a] Nor is he precluded from recovering the value of the time he has lost by reason of the injury, though his employer has in fact continued his salary.[b]

In an action for breach of a covenant of warranty under a mortgage, it was held that the plaintiff, having paid the mortgage before judgment, might recover the whole amount of it, although he had previously conveyed the estate to one who assumed, as a part of the consideration of that conveyance, to pay part of the mortgage.[c]

The amount received by the plaintiff on an insurance policy cannot be shown to reduce the damages.[d] In Perrott *v.* Shearer,[e] Cooley, C. J., said of the defendant in such a case: "His equitable claim to a reduction of damages, if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to this is, that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities."

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[a] Norristown *v.* Moyer, 67 Pa. 355; as by gratuitous nursing, Pennsylvania R.R. Co. *v.* Marion, 104 Ind. 239.

[b] Ohio & M. Ry. Co. *v.* Dickerson, 59 Ind. 317; *contra*, Drinkwater *v.* Dinsmore, 80 N. Y. 390.

[c] Estabrook *v.* Smith, 6 Gray 572.

[d] Yates *v.* Whyte, 4 Bing. N. C. 272; Propeller Monticello *v.* Mollison, 17 How. 152; Cannon *v.* The Potomac, 3 Woods 158; Cunningham *v.* E. & T. H. R.R. Co., 102 Ind. 478; Hayward *v.* Cain, 105 Mass. 213; Weber *v.* M. & E. R.R. Co., 35 N. J. L. 409; Kingsbury *v.* Westfall, 61 N. Y. 356; Carpenter *v.* Eastern Transp. Co., 71 N. Y. 574; Briggs *v.* N. Y. C. & H. R. R.R. Co., 72 N. Y. 26; Hammond *v.* Schiff, 100 N. C. 161; Texas & P. Ry. Co. *v.* Levi, 59 Tex. 674; Harding *v.* Townshend, 43 Vt. 536; Brown *v.* McRae, 17 Ont. 712.

[e] 17 Mich. 48, 56.

In Bradburn *v.* Great Western R. Co.(a) it was held, in an action for injuries suffered by the defendant's negligence, that a sum received by the plaintiff on an accident insurance policy could not be taken into account in reduction of damages, the court saying: "The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with a third party."

Where an action is brought (under a statute) for damages causing death, the rule in England is different. There it is held that since the ground of the plaintiff's recovery is loss of support, it may be shown that the wrongful act has given to the plaintiff a certain amount of money from an insurance company to apply to his support.(b) In the United States, however, the ordinary rule is followed, and the amount recovered is not reduced by the amount of insurance money.(c) In Canada the English rule was at first followed,(d) but the contrary rule has been laid down by the Privy Council in a Canadian appeal,(e) and followed in Canada.(f) What effect the decision of the Privy Council will have in England remains to be seen.

Compensation for Injury to a Limited Interest in Property.

§ 68. **Damages as affected by limited ownership.**—Property may be injured in which two or more persons have

(a) L. R. 10 Ex. 1.

(b) Blake *v.* M. Ry. Co., 18 Q. B. 93; Hicks *v.* N. A. & H. R.R. Co., 4 B. & S. 403 n.

(c) Sherlock *v.* Alling, 44 Ind. 184, 199; Althorf *v.* Wolfe, 22 N. Y. 355; Terry *v.* Jewett, 17 Hun 395; Harding *v.* Townshend, 43 Vt. 536.

(d) Beckett *v.* Grand T. Ry. Co., 13 Ont. App. 174.

(e) Grand T. Ry. Co. *v.* Jennings, 13 App. Cas. 800.

(f) Grand T. Ry. Co. *v.* Beckett, 16 Can. 713.

an interest, and the amount of compensation recoverable by one of the owners will not usually be the whole amount which the wrong-doer should pay. In no case should the fact that there are two owners put upon the wrong-doer the liability of paying increased damages; and if (as will sometimes be the case) one party in interest recovers compensation for the entire injury, this is a bar to an action by any one else, or at least to the recovery of more than nominal damages. But where one owner recovers less than the amount of the injury, the exact measure of his recovery is often a matter difficult to settle.

§ 69. **Damages recoverable by owner of limited interest in land.**—Any one having an interest in land is liable to suffer injury with respect to this right; and accordingly, if his right, however limited it be, is injured, he may recover compensation equal to his individual loss. The general rule may be said to be that the extent of the injury to the plaintiff's proprietary right, whatever it may be, furnishes the measure of damages. The owner of a freehold may recover for an injury which permanently depreciates his property, while a tenant, or one having only a possessory right, may recover for an injury to the use and enjoyment of that right.[a] If there is a reversionary interest, and the defendant is answerable over in part to the reversioner, the defendant must show that fact.[b]

§ 70. **By an occupant of land.**—The mere occupant of premises injured by the setting back of water upon them is entitled to damages to an amount sufficient to indem-

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[a] Gourdier *v.* Cormack, 2 E. D. Smith 200; Seeley *v.* Alden, 61 Pa. 302; Jefcoat *v.* Knotts, 13 Rich. L. 50.

[b] Todd *v.* Jackson, 26 N. J. L. 525.

nify him for the interest he had in the premises.(a) So it has been held in North Carolina that a *cestui que trust* in possession may recover the damages actually caused to him—that is, such loss as he suffered through loss of the bare possession—which, in the absence of special damages, would be nominal merely.(b)

§ 71. **By a lessee of land.**—The injury to a lessee may consist in a definite and particular loss in the enjoyment of demised premises, or in an act permanently depreciating the value of the lease. In the former case the extent of the particular loss, not the diminished value of the entire lease or of the injured portion of the premises, is the measure of damages.(c) In estimating the injury to the tenant's right of possession, it may be necessary to allow full compensation for the injury. Thus where the plaintiff was the lessee for years of certain premises at an annual rent, with liberty to dig half an acre of brick earth annually, and covenanted that he would not dig more, or that, if he did, he would pay an increased rent of £375 per half acre, being after the rate that all the brick earth was sold for, and a stranger dug and took away brick earth; the lessee recovered against him the full value of the earth dug, on the ground that by the terms of the lease the tenant would be liable over for the waste to the landlord.(d) So where the tenant sues for an injury to the building demised, and by the terms of the tenancy the plaintiff is bound to make repairs, and to restore the premises to the landlord at the end of

(a) Brown *v.* Bowen, 30 N. Y. 519. Where an action is maintainable by one who has possession only, and is brought by one claiming title as well as possession, the defendant cannot show want of title in the plaintiff in mitigation of damages. Reed *v.* Price, 30 Mo. 442.

(b) Salisbury *v.* Western N. C. R.R. Co., 98 N. C. 465.

(c) Terry *v.* New York, 8 Bosw. 504.

(d) Attersoll *v.* Stevens, 1 Taunt. 183.

the term in as good a condition as when they were leased, then the defendant is bound to enable the plaintiff to put the building in as good a condition as it was when the trespass was committed.(a)

In the ordinary case, however, the injury will be to the reversioner as well as to the lessee, and the latter can recover only the loss to his interest, which is the diminished value of the lease.(b) Thus Heath, J., said, in Attersoll *v.* Stevens:(c) "If trees are demised and a stranger cuts them, the lessee shall have his action of trespass; but the measure of damages is not the value of the trees, but the loss of the shade and fruit during his term." So the measure of damages for an injury to a tenant for years caused by flooding his lands was held to be the loss of the use of the lands and their yearly products.(d) And where in an action of trespass by a tenant against his landlord, the premises had been in the possession of subtenants, who before the end of the term left them for a consideration paid by the defendant, and the defendant thereupon removed the houses with a view to rebuilding, the measure of the tenant's damages was held to be the rent or value of the use of the premises for the rest of the term only.(e)

(a) Walter *v.* Post, 4 Abb. Pr. 382; 6 Duer, 363 s.c. In Weston *v.* Gravlin, 49 Vt. 507, it was held that a tenant could recover for all the damage done to a house where the acts directly interfered with the plaintiff's enjoyment of the premises, the court saying that, as the facts appeared in the case at bar, the tenant would ordinarily have to repair the injuries in order to make the house habitable.

(b) Holmes *v.* Davis, 19 N. Y. 488; Sheldon *v.* Van Slyke, 16 Barb. 26; Van Buren *v.* Fishkill & M. W. W. Co., 50 Hun 448; Drew *v.* Baby, 1 Up. Can. Q. B. 438; Fisher *v.* Grace, 27 Up. Can. Q. B. 158; Atkinson *v.* Beard, 11 Up. Can. C. P. 245.

(c) 1 Taunt. 182, 189.

(d) Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

(e) Schlemmer *v.* North, 32 Mo. 206.

§ 72. **By a life-tenant of land.**—In an action by a tenant for life for damages to the estate, the damages were held to be measured by the present value of the rents and profits of the premises, multiplied by the probable number of years of the plaintiff's life, less the probable amount of taxes, repairs, and insurance, and a rebate of interest.[a]

§ 73. **By a mortgagee of land.**—The mortgagee of real estate out of possession may bring an action for the impairment of his security, and may recover the amount by which his security is impaired, not, however, exceeding the amount of the injury. This is generally held to be all he can recover, whether his action is against the mortgagor or his assignee,[b] or against a stranger.[c]

In Massachusetts, however, it has been held that the mortgagee, as legal owner, is not limited in his recovery to the amount by which the security may be impaired, but is entitled to recover the whole loss. While there are perhaps technical grounds for supporting this decision, where the action is by a first mortgagee against a stranger,[d] yet the doctrine is carried further and the junior mortgagee is allowed to recover the whole amount of the loss,[e] even against the mortgagor or his assignee.[f] There seems to be a conclusive objection to such recovery: the junior mortgagee, having no legal title and no possession, can bring no action of trespass

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[a] Greer *v.* New York, 1 Abb. N. S. 206.

[b] Cory *v.* Silcox, 6 Ind. 39; Lane *v.* Hitchcock, 14 Johns. 213; Van Pelt *v.* McGraw, 4 N. Y. 110; State *v.* Weston, 17 Wis. 107.

[c] Jackson *v.* Turrell, 39 N. J. L. 329; Schalk *v.* Kingsley, 42 N. J. L. 32; Yates *v.* Joyce, 11 Johns. 136; Gardner *v.* Heartt, 3 Den. 232; Atkinson *v.* Hewett, 63 Wis. 396.

[d] Jackson *v.* Turrell, 39 N. J. L. 329.

[e] Gooding *v.* Shea, 103 Mass. 360.

[f] Byrom *v.* Chapin, 113 Mass. 308.

or waste, but is restricted to an action on the case for the impairment of his security; and in such an action, as impairment is the gist of it, so recovery should be had for such injuries only as cause impairment. But even in Massachusetts it was held that the trespasser should be allowed to show, in mitigation of damages, that the plaintiff had, since the taking, under his power of sale, sold the property for more than his debt and prior incumbrances.(a) The court said: "The general rule is that the damages must be precisely commensurate with the injury which the plaintiff suffers by the act of wrong at the time it was committed; but under this rule the defendant is constantly permitted to give in evidence the plaintiff's subsequent change of relation to the property for the purpose of showing that the damages, to which he would otherwise have been entitled, have been thereby diminished."

A practical difficulty arises in case of recovery by a junior mortgagee. It may be impossible to decide, in the absence of the first mortgagee, whether the security of the junior mortgagee alone, or of the prior mortgagee also, has been impaired. If the injury was so great as to impair the security of the first mortgagee, he has a right to compensation which cannot be barred by judgment in favor of the junior mortgagee. In New Jersey,(b) though the question was not passed upon by the court, it has been suggested that the money should be paid into court, and that if the prior mortgagee should not come in to present his claim, the junior mortgagee may be required, before taking it out, to give a bond of indemnity. In Massachusetts it has been held, as just stated, that the junior mortgagee's measure of damages is not

(a) King *v.* Bangs, 120 Mass. 514.
(b) Jackson *v.* Turrell, 39 N. J. L. 329.

affected by the existence of a prior mortgage ;([a]) but how the defendant can be protected against his liability to the prior mortgagee is a question not disposed of by the courts of that State.

§ 74. **By a reversioner.**—In actions brought by reversioners for injuries to their inheritance (the remedy being by an action on the case), it was at first doubted whether the reversioner's remedy was not limited to the case of an absolute and permanent diminution of the value of the property ; and in an action for erecting a wall, whereby the plaintiff's lights were obstructed, the declaration counting for the plaintiff as reversioner, it was insisted that a temporary nuisance could not be an injury to the inheritance ; but the court held otherwise, being of opinion that an action might be brought by the tenant in respect of his possession, and by the landlord or reversioner in respect of his inheritance, for the injury done to the value of it.[1] It is now well settled that, if the act complained of works any injury to the inheritance, or affects in any way the reversioner's title, the law will remunerate him in damages.([b]) For example, building a roof with

[1] Jesser *v.* Gifford, 4 Burr. 2141. In Massachusetts it was held, previous to the revision of the statutes of that State, that the owner of real estate in the possession of a lessee, other than at will, could not maintain trespass for an injury to his reversionary interest, and that case was the only remedy. Lienow *v.* Ritchie, 8 Pick. 235. But if the lessee were at will only, it was held that trespass would lie. Now, however, since the Pub. Stat., ch. 121, § 12, requiring three months' notice to be given in order to determine estates at will, this distinction is held to be done away, and case is considered the proper remedy for any injury to the landlord's reversionary interest in estates at will as well as others. French *v.* Fuller, 23 Pick. 104.

([a]) Gooding *v.* Shea, 103 Mass. 360.

([b]) Shadwell *v.* Hutchinson, 3 C. & P. 615; s. c. 4 C. & P. 333; Cooper *v.* Randall, 59 Ill. 317; Indianapolis B. & W. Ry. Co. *v.* McLaughlin, 77 Ill. 275; Illinois & S. L. R.R. & C. Co. *v.* Cobb, 94 Ill. 55; Dorsey *v.* Moore, 100 N. C. 41; Dutro *v.* Wilson, 4 Oh. St. 101; Schnable *v.* Koehler, 28 Pa. 181; Drew *v.* Baby, 1 Up. Can. Q. B. 438; Atkinson *v.* Beard, 11 Up. Can. C. P. 245.

eaves which discharge rain water by a spout into the adjoining premises is an injury for which the landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is a damage to the reversion.[1]

But the injury must always be to the reversion, and the reversioner cannot recover for damage to tenants merely ;(a) so a reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way.[2] But case lies by reversioner against one who erects a dam on the adjacent land and backs the water on the plaintiff's mill race.[3]

So, where the defendant, being a lessee for years, without leave opened a door in the house owned by the plaintiff as landlord, and the jury found that the house was not in any way weakened or injured by the act, the court refused to allow a verdict for nominal damages to be entered, and directed a new trial to be had on this point, saying: "We cannot say that the opening of the door in this case affects the evidence of the plaintiff's title. That is a question of fact."[4] But as it is evident that injuries of this character are often of a nature very difficult to be estimated, the courts have uniformly exhibited great caution in requiring the fact of damage to the reversionary interest to be clearly established. Thus it is held that, in actions of this nature, it must be distinctly averred in the declaration that the act complained of has been done to the damage of the reversion,

[1] Tucker *v.* Newman, 11 A. & E. 40.
[2] Baxter *v.* Taylor, 4 B. & A. 72.
[3] Ripka *v.* Sargeant, 7 W. & S. 9.
[4] Young *v.* Spencer, 10 B. & C. 145.

(a) Cooper *v.* Randall, 59 Ill. 317; Dixon *v.* Baker, 65 Ill. 518; I. & St. L. R.R. & C. Co. *v.* Cobb, 94 Ill. 55.

or must state an injury of such permanent nature as to be necessarily injurious to the reversion ;([a]) and where a verdict was obtained on a declaration alleging that the defendant had constructed a wall so as to overhang the yard of which the plaintiff was reversioner, and to produce a water drip in the yard, but without alleging any injury to the plaintiff's reversionary estate and interest in the premises, the judgment was arrested by the King's Bench.[1] So, again, it has been held that the obstruction of a public navigable river is not a damage to a reversioner out of possession of premises abutting thereon.[2]

As in previous instances, the market value of the reversion cannot be taken as the measure of damages where the injury to be compensated is not a permanent continuing one, but consists in specific past damage. Thus in an action by a reversioner for damages done to the reversion, by cutting off the eaves of a building belonging to him, and by erecting a wall with a drip over his premises, it was held that, as there might be repeated actions for continuing the nuisance, evidence for the purpose of showing the diminution in the salable value of the premises should be rejected.([b])

Where there are several reversioners, as tenants for life, in tail, or in fee, each can recover compensation for the injury to his own estate.([c])

§ 75. **By a tenant in common of land.**—One tenant in common of land may maintain an action for injury to the land if the non-joinder of the other tenants in com-

[1] Jackson *v.* Pesked, 1 M. & S. 234. [2] Dobson *v.* Blackmore, 9 Q. B. 991.

([a]) Chicago *v.* McDonough, 112 Ill. 85; Tinsman *v.* B. D. R.R. Co., 25 N. J. L. 255; Halsey *v.* L. V. R.R. Co., 45 N. J. L. 26.

([b]) Battishill *v.* Reed, 18 C. B. 696.

([c]) Zimmerman *v.* Shreeve, 59 Md. 357.

mon is not pleaded in abatement, and may recover his share of the damages.(a) So one of two reversioners may maintain an action, if the defendant does not plead in abatement, and recover his share of the damages.(b)

Where, under the old practice in ejectment, a recovery was effected on the demise of two only, out of several tenants, and suit was afterward brought for mesne profits, it was held that none but the shares of the mesne profits to which those two tenants were entitled could be recovered.(c) So, where a plaintiff in ejectment was tenant in common of the premises withheld, with one not a party to the suit, he was entitled to recover as damages for the detention a part of the mesne profits only, in proportion to his interest, and not the whole.(d)

Where one tenant in common sues the other for excluding him from the land, the measure of damages is the proportional part of the rental value, and not of the profits which may in fact have been received by the defendant.(e)

§ 76. **By a possessor of chattels against a trespasser.**— By a peculiar doctrine of the law of personal property, the possessor of such property is endowed, for the purpose of protecting it against strangers, with all the rights of ownership. It follows from this general principle that one in possession of a chattel may recover from a stranger who injures it full damages, and in that case he will be held responsible at law to the owner (f) for all the damages above the amount of his own interest. And

(a) Daniels *v.* Brown, 34 N. H. 454.
(b) Putney *v.* Lapham, 10 Cush. 232.
(c) Holdfast *v.* Shepard, 9 Ired. 222.
(d) Clark *v.* Huber, 20 Cal. 196.
(e) Cutter *v.* Waddingham, 33 Mo. 269.
(f) Heydon & Smith's Case, 13 Co. 67; Treadwell *v.* Davis, 34 Cal. 601; White *v.* Webb, 15 Conn. 302; Schley *v.* Lyon, 6 Ga. 530; Atkins *v.* Moore,

so it has been held in the various cases of consignors,[a] depositaries,[b] factors,[c] lessees,[d] lienors,[e] pledgees,[f] sheriffs,[g] and finders of property.[h]

Thus, where the plaintiff was a collector and transmitter of small parcels and responsible for their safe delivery, he was allowed to recover the full value against a railway company, in an action of case for negligence, on the ground of his liability to pay their value to the true owner, whether he had actually paid it or not.[k]

Again, where unredeemed pledges deposited with the plaintiff in the way of his trade as a pawnbroker, and which were held under the English law to be protected from distress, had been seized by his landlord under a distress warrant, it was held in an action of trover for the goods, that as the defendant was an absolute wrong-doer, without color of right, the bailee was entitled to recover their full value.[l]

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82 Ill. 240; Davidson *v.* Gunsolly, 1 Mich. 388; Burk *v.* Webb, 32 Mich. 173; Chesley *v.* St. Clair, 1 N. H. 189.

[a] Crouch *v.* L. & N. W. Ry. Co., 2 C. & K. 789; Finn *v.* W. R.R. Co., 112 Mass. 524; Garretson *v.* Brown, 26 N. J. L. 425.

[b] Rooth *v.* Wilson, 1 B. & Ald. 59; Burton *v.* Hughes, 2 Bing. 173.

[c] Groover *v.* Warfield, 50 Ga. 644.

[d] St. L. I. M. & S. Ry. Co. *v.* Biggs, 50 Ark. 169; Freeman *v.* Underwood, 66 Me. 229; Harker *v.* Dement, 9 Gill 7; Caswell *v.* Howard, 16 Pick. 562; Baker *v.* Hart, 52 Hun 363.

[e] Arnd *v.* Amling, 53 Md. 192; Davidson *v.* Gunsolly, 1 Mich. 388; Hays *v.* Riddle, 1 Sandf. 248; Hill *v.* Larro, 53 Vt. 629.

[f] Swire *v.* Leach, 18 C. B. (N. S.) 479; Treadwell *v.* Davis, 34 Cal. 601; U. S. Ex. Co. *v.* Meints, 72 Ill. 293; Soule *v.* White, 14 Me. 436; Pomeroy *v.* Smith, 17 Pick. 85; Ullman *v.* Barnard, 7 Gray 554; Adams *v.* O'Connor, 100 Mass. 515; Mechanics' & Traders' Bank *v.* Farmers' & Mechanics' Bank, 60 N. Y. 40; Alt *v.* Weidenberg, 6 Bosw. 176; Lyle *v.* Barker, 5 Binn. 457.

[g] Robinson *v.* Ensign, 6 Gray 300; Burk *v.* Webb, 32 Mich. 173; Poole *v.* Symonds, 1 N. H. 289; Buck *v.* Remsen, 34 N. Y. 383.

[h] Armory *v.* Delamirie, 1 Stra. 504.

[k] Crouch *v.* L. & N. W. Ry. Co., 2 C. & K. 789.

[l] Swire *v.* Leach, 18 C. B. (N. S.) 479.

And where certain formalities are required by statute for the attachment of pledged property, and a sheriff pretends to attach pledged property without following out the method prescribed, he is liable to the pledgee for the whole value of the property.([a])

The plaintiff was lessee of a quarry, with the right to take out stone. The defendant wrongfully quarried and carried away stone, and the plaintiff sued him for conversion. It was held that the plaintiff had sufficient interest in the stone to bring trover, and could recover the whole value of it.([b]) In a similar action by a lessee against a trespasser who carried away fruit, it was held that the lessee could recover the full value of the fruit.([c])

In an isolated case in Alabama, intimating that he who has a bare possessory right is not entitled to full damages, the facts are not clearly reported.([d]) Of the cases cited by the court, two are actions against the general owner, and one is an action by a joint owner. It can hardly be regarded as authority on the point under discussion.

§ 77. **In replevin by one who counts on possession merely.** —The same rule should prevail in replevin; the person from whose possession goods have been taken wrongfully by a stranger should recover the full value of the goods, either in an action on the bond, or, in those States permitting such a proceeding, in the original action. And such is the doctrine generally held.([e])

([a]) Pomeroy *v.* Smith, 17 Pick. 85; Compton *v.* Martin, 5 Rich. L. 14.

([b]) Baker *v.* Hart, 52 Hun 363.

([c]) Freeman *v.* Underwood, 66 Me. 229.

([d]) Sterrett *v.* Kaster, 37 Ala. 366.

([e]) Broadwell *v.* Paradice, 81 Ill. 474; Atkins *v.* Moore, 82 Ill. 240; Burt *v.* Burt, 41 Mich. 82; Dilworth *v.* McKelvy, 30 Mo. 149; Fallon *v.* Manning, 35 Mo. 271; Frei *v.* Vogel, 40 Mo. 149; Miles *v.* Walther, 3 Mo. App. 96; Frey *v.* Drahos, 7 Neb. 194; Buck *v.* Remsen, 34 N. Y. 383.

But there seems a disposition on the part of some courts to hold that the mere possessor can recover in this case compensation for his own interest only.[a] And so it has been held in Iowa that where goods in the possession of a sheriff are wrongfully replevied by a stranger, the damages are limited to the amount of the execution.[b] Unless these cases are to be justified by local usage (on which the Maryland court seemed to rely) or on the form of the statute, they can hardly be supported.

In Ohio the statute authorizes the jury to give one who has a mere right of possession such damages as he has sustained. It is held that according to this statute the prevailing party is limited to the value of his interest,[c] or if that exceeds the value of the goods replevied, to the value of the goods.[d]

§ 78. By the possessor of chattels in an action against the owner.—The rule which puts the possessor of chattels in the position of the owner in actions against strangers does not apply where the wrong-doer is himself the owner. In such a case, according to the general principle, the possessor wrongfully deprived of the possession can recover only the amount by which he is actually damaged; that is, the amount of his interest in the property.[e]

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[a] Noble *v.* Epperly, 6 Ind. 468; Cumberland Coal and Iron Co. *v.* Tilghman, 13 Md. 74.

[b] Hayden *v.* Anderson, 17 Ia. 158, 165; *contra*, Buck *v.* Remsen, 34 N. Y. 383.

[c] Jennings *v.* Johnson, 17 Ohio 154. So in Michigan: Darling *v.* Tegler, 30 Mich. 54.

[d] Latimer *v.* Motter, 26 Oh. St. 480.

[e] In general: Sopris *v.* Lilley, 2 Col. 496; Schley *v.* Lyon, 6 Ga. 530; Benjamin *v.* Stremple, 13 Ill. 466; Davidson *v.* Gunsolly, 1 Mich. 388; Fitzhugh *v.* Wiman, 9 N. Y. 559; Seaman *v.* Luce, 23 Barb. 240; Rhoads *v.* Woods, 41 Barb. 471.

Factor: Frost *v.* Willard, 9 Barb. 440.

Lessee: Compton *v.* Martin, 5 Rich. L. 14; Hickok *v.* Buck, 22 Vt. 149.

Lienor: Albert *v.* Lindau, 46 Md. 334; Jarvis *v.* Rogers, 15 Mass. 389;

"If the defendant, in the assertion and vindication of his supposed rights, and not for fraudulent purposes, or as a mere stranger, replevied the property, the measure of damages in this action is not necessarily the value of the property, but the extent of the plaintiff's injury by being deprived of such right as he in fact had in the property when return thereof should have been made. . . . . The true question is, what has the plaintiff lost, or to what amount is he injured by the failure of the defendant to return the property? and to determine this, it is material to know the extent of his interest." ([a])

Accordingly, when goods are replevied by the owner from one having the right of possession, the latter can recover as damages only the amount of his interest.[1]([b]) Thus, in Illinois it appeared that one B. distrained for rent. D., the owner, replevied the property, but did not prosecute the action, and a return of the property was decreed to B. D. did not return, and B. sued on the replevin bond. His damages were held to be, not the full value of the property, but only the value of his special interest, *i. e.*, the rent.([c]) Where goods were sold by the defendant to the plaintiff, and delivered, but the title was not to pass until complete payment was made, the

[1] Harman *v.* Goodrich, 1 Greene (Ia.) 13; Belt *v.* Worthington, 3 G. & J. 247.

Ingersoll *v.* Van Bokkelin, 7 Cow. 670; Case *v.* Hart, 11 Ohio 364; Lyle *v.* Barker, 5 Binn. 457, 460.

Pledgee: Hurst *v.* Coley, 15 Fed. Rep. 645; Clark *v.* Bell, 61 Ga. 147; Bradley *v.* Burkett, 82 Ga. 255; Hays *v.* Riddle, 1 Sandf. 248.

Sheriff: Bartlett *v.* Kidder, 14 Gray 449; Spoor *v.* Holland, 8 Wend. 445; Scrugham *v.* Carter, 12 Wend. 131.

([a]) Warner *v.* Matthews, 18 Ill. 83.

([b]) Hawley *v.* Warner, 12 Ia. 42; Jones *v.* Hicks, 52 Miss. 682; Cruts *v.* Wray, 19 Neb. 581; Dows *v.* Greene, 24 N. Y. 638; Weaver *v.* Darby, 42 Barb. 411.

([c]) David *v.* Bradley, 79 Ill. 316.

plaintiff in an action for conversion by wrongfully resuming possession of the goods can recover only his interest; that is, the amount of his payments.[a]

§ 79. By a possessor of chattels where the owner cannot recover the full value.—The possessor, even if he is suing a stranger, cannot recover more than the value of his own interest where the owner would not have been entitled to recover more. In Sheldon *v.* Southern Express Co.[b] it appeared that one T., being indebted to the plaintiff, transferred a note to the defendant express company (which the company agreed to collect), giving the receipt for it to the plaintiff as security for his debt. The defendant, failing to collect it, allowed it to go into the hands of T., who collected it and paid the plaintiff a portion of his debt. The measure of damages was held to be the unpaid portion of T.'s debt to the plaintiff.

So although as a general rule a bailee, *e. g.*, a warehouseman, may insure goods and recover the full value on the policy, yet if the owner has also insured them the loss must be apportioned between the companies insuring.[c] Where goods were taken from the plaintiff, a naked bailee, and restored by the wrong-doer to the owner, nominal damages only can be recovered.[d] And a pledgee in a suit against a warehouseman for wrongful delivery to the pledgor recovers the amount of his loan, being less than the value of the property.[e]

And the rule is the same where the defendant claims,

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[a] Levan *v.* Wilten, 135 Pa. 61.

[b] 48 Ga. 625.

[c] Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527.

[d] Squire *v.* Hollenbeck, 9 Pick. 551; Lowell *v.* Parker, 10 Met. 309; Mears *v.* Cornwall, 73 Mich. 78; Criner *v.* Pikes, 2 Head 398.

[e] Fifth National Bank *v.* Providence Warehouse Co., 20 Atl. Rep. 203 (R. I.).

under the owner, as a vendee,[a] or an attaching sheriff.[b] Where an officer had paid freight due on goods attached by him, and afterwards, on demand of a person who had a lien on them for advances, refused to pay either the amount of the lien or to release the attachment, it was held, in an action against him for conversion of the property, that the amount he had paid for the freight must be deducted from its value.[c]

But of course the amount that can be recovered is limited by the injury done or the goods taken.[d]

§ 80. **By an owner of chattels out of possession.**—An owner of chattels, though out of possession, can generally recover full compensation for any injury done to them; and such recovery will bar action by the possessor.[e]

Where, however, the defendant has a beneficial interest in the property, the measure of damages is reduced by the amount of the defendant's interest. Thus, a pledgor or other lienor can recover of the pledgee, in an action for a wrongful sale or other conversion of the pledged goods, only the excess of the value of the property over the amount of the debt.[f]

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[a] Belden *v.* Perkins, 78 Ill. 449; Linville *v.* Black, 5 Dana, 177; Chadwick *v.* Lamb, 29 Barb. 518.

[b] Baldwin *v.* Bradley, 69 Ill. 32; Penland *v.* Leatherwood, 101 N. C. 509; Clark *v.* Lamoreux, 70 Wis. 508.

[c] Clark *v.* Dearborn, 103 Mass. 335.

[d] Burk *v.* Webb, 32 Mich. 173; Hamilton *v.* Lau, 24 Neb. 59; Boydston *v.* Morris, 71 Tex. 697.

[e] Eisendrath *v.* Knauer, 64 Ill. 396; Chesley *v.* St. Clair, 1 N. H. 189; Green *v.* Clarke, 12 N. Y. 343.

[f] Bac. Abr. *Bailment*, B.; Halliday *v.* Holgate, L. R. 3 Ex. 299; Baldwin *v.* Bradley, 69 Ill. 32; Loomis *v.* Stave, 72 Ill. 623; Belden *v.* Perkins, 78 Ill. 449; Ludden *v.* Buffalo Belting Co., 22 Ill. App. 415; Shaw *v.* Ferguson, 78 Ind. 547; Rosenzweig *v.* Frazer, 82 Ind. 342; First Nat. Bank of Louisville *v.* Boyce, 78 Ky. 42; Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269; Chamberlain *v.* Shaw, 18 Pick. 278; Fowler *v.* Gilman, 13 Met. 267; Briggs *v.* B. & L. R.R. Co., 6 All. 246; Fisher *v.* Brown, 104 Mass.

In an English case, a bankrupt had deposited certain dock warrants for brandy in dock as security for a loan, and it was agreed that the pledgee might sell the brandy if the loan were not repaid on the 29th of January following. The pledgee sold the brandy on the 28th, and on the 29th delivered the warrants to the purchaser, who took possession of the brandy on the 30th. This was held by all the court to be a conversion, although the bankrupt could not have redeemed the property. But the majority of the court held that the wrongful acts of the pawnee did not annihilate the contract between the parties, nor the interest of the pawner in the goods under it. The pawnee had the right to have his debt deducted from the value of the property in estimating damages. Mr. Justice Williams dissenting, held that the bailment having been terminated by the wrongful act of the pledgee, the property reverted to the pledgor as its absolute owner, and as such absolute owner he was entitled to full damages.([a]) So where a corporation wrongfully sold stock of a stockholder for non-payment of calls, in an action for the conversion it was held that the plaintiff's recovery must be diminished by the amount of the calls.([b])

A note payable twelve months after date, given to an insurance company for premiums, was pledged by the company as collateral security for a loan less than its face. The maker of the note paid the loan, taking up the note before its maturity. The company, becoming insolvent, assigned their property to assignees, who brought trover for the note. The action was held main-

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259; Stearns *v.* Marsh, 4 Den. 227; Levy *v.* Loeb, 47 N. Y. Super. Ct. 61; Craig *v.* McHenry, 35 Pa. 120; Wheeler *v.* Pereles, 43 Wis. 332.

([a]) Johnson *v.* Stear, 15 C. B. (N. S.) 330; 33 L. J. C. P. 130.

([b]) Budd *v.* Multnomah S. Ry. Co., 15 Ore. 413.

tainable, as the note was by its terms liable for the company's losses up to its maturity, and the measure of recovery was the balance of the note over the amount of the loan.(a) So it was held in Boutell *v.* Warne,(b) that where property was adjudged to the defendant, the jury should deduct from the value of the property the amount paid by the plaintiff for the property on a contract to purchase.

So where an agent pawned his principal's watch, and waived notice without authority, and the pledgee sold it without notice, it was held that the principal could recover the excess of the value of the watch over the money received by the agent.(c) So a pledgee who has converted stock can recoup the amount of assessments rightfully paid on the stock.(d)

The same principle is applied where the action is brought by the owner of chattels against one who has succeeded to the rights of the lienor or other possessor. Thus it was held that a defendant who had received goods from the plaintiff's agent, which were intended for sale, but were sold contrary to the instructions of the principal, could have deducted from the market value of the goods the amount paid by him to discharge a lien of a common carrier.(e)

By the law of Massachusetts an assignment in trust for creditors is valid as to those creditors only who assent to it. Property so assigned having been attached by a creditor of the assignor, it was held that the trustee to whom the assignment was made could recover only the

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(a) Fell *v.* McHenry, 42 Pa. 41.
(b) 62 Mo. 350.
(c) Van Arsdale *v.* Joiner, 44 Ga. 173.
(d) McCalla *v.* Clark, 55 Ga. 53.
(e) Stollenwerck *v.* Thacher, 115 Mass. 224.

amount of his own debt.(a) Indeed, wherever the defendant, although in the wrong in assuming or retaining a possession which rightfully belongs to the plaintiff, has yet a legal or equitable interest in the chattel, the action is now treated on equitable principles, and the recovery limited to the actual net amount of the plaintiff's claim.(b)

So where one having bought sheep on credit left them in custody of the vendor, and without default of the vendee the vendor resold them, it was held by the English Court of Exchequer that the measure was not their value, but merely the actual damage sustained.(c) And where the lessor of sheep sued the lessee for conversion of the wool, on which the lessee had a lien, it was held that the amount of the lien should be deducted from the damage.(d)

This doctrine applies only where the defendant has an interest in the goods; and in that case, the reduction allowed is only the amount of such interest. So where the conversion sued for is by an unlawful sale of goods by one having a lien on them, the expenses of the sale cannot be allowed the defendant.(e) So where a bailee wrongfully retained the property until he secured judgment against the owner, and then levied on the property, the owner was allowed to recover the whole value, for at the time of the injury the defendant had no interest in the property.(f)

So, again, where personal property has been delivered under an agreement of sale, by which the title is not to vest in the vendee till the payment in full of the pur-

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(a) Boyden *v.* Moore, 11 Pick. 362.

(b) Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269.

(c) Chinery *v.* Viall, 5 H. & N. 288; 2 L. T. R. (N. S.) 466.

(d) Chamberlain *v.* Shaw, 18 Pick. 278.

(e) Briggs *v.* B. & L. R.R. Co., 6 All. 246.

(f) Edmundson *v.* Nuttall, 17 C. B. (N. S.) 280; and see St. John *v.* O'Connel, 7 Port. 466; Hatheway *v.* F. R. Nat. Bank, 131 Mass. 14.

chase-money, but is sold or mortgaged to a third party or attached by the vendee's creditors, the general rule remains unqualified, and the vendor is entitled to recover the full value and interest from the time of the conversion, without any deduction for payments made on account by the original vendee; for the vendee has no interest in the property which could be conveyed to a third party or attached, and the defendant in this case has therefore no interest in the property.(a)

§ 81. **By the mortgagor or mortgagee of chattels.**—The right of a party to a mortgage of chattels to recover for injury inflicted by a stranger depends usually on possession. It is often held that a chattel mortgage does not pass the legal title, but only an interest in the property, to the mortgagee. But if the mortgagee takes possession of the property, he stands in the same position as a pledgee with reference to damages, and therefore a mortgagee in possession can recover full compensation from a stranger.(b) And so a mortgagor left in possession of the goods, no matter whether he is regarded as the legal owner or merely as having an equitable interest in them, can recover full compensation for injuries inflicted by a stranger.(c)

(a) Brown *v.* Haynes, 52 Me. 578; Angier *v.* Taunton Paper Manufacturing Co., 1 Gray 621; Colcord *v.* McDonald, 128 Mass. 470. But *contra*, Chaffee *v.* Sherman, 26 Vt. 237; Lillie *v.* Dunbar, 62 Wis. 198.

(b) White *v.* Webb, 15 Conn. 302; Madison Nat. Bank *v.* Farmer, 5 Dak. 282; Warren *v.* Kelley, 80 Me. 512; Barry *v.* Bennett, 7 Met. 354; Allen *v.* Butman, 138 Mass. 586; Densmore *v.* Mathews, 58 Mich. 616; Adamson *v.* Petersen, 35 Minn. 529.

(c) Turner *v.* Hardcastle, 11 C. B. (N. S.) 683; Cram *v.* Bailey, 10 Gray 87; Brown *v.* Carroll, 16 R. I. 604; Turnpike Co. *v.* Fry, 88 Tenn. 296. In a case in England at *nisi prius* the court, in its anxiety to punish the plaintiff for fraud, seems to have lost sight of the rights secured by possession. The plaintiff, in order to baffle his creditors, made a colorable transfer of property to a third party, but remained in possession; and the

If a mortgagee brings suit against a wrong-doer, and pending the suit the mortgage is redeemed, it has been held that the plaintiff can recover only nominal damages; for no longer having an interest in the property, he would not hold the proceeds in trust for the owner.(a) If the decision is sound, it would apply to any case where suit is brought by a bailee, and possession is resumed by the bailor pending the suit.

The party out of possession should, if regarded as owner, be allowed to recover full compensation from a stranger; and if not the owner, compensation to the amount of his interest, if he recovers judgment before the other party.

So where, under an execution against a mortgagor of chattels rightfully in possession, the chattels are, without notice to the mortgagee, sold to various purchasers so as to injure or sacrifice the interest of the mortgagee, although the latter cannot maintain an action in the nature of trespass or trover for the value of the goods, he may, it seems, in an action in the nature of case, recover damages to the extent of the injury to his interest.(b) In such an action by a mortgagee against the receiver of the mortgaged property and others for an injury to his interest, the damages should be confined to the loss he has suffered by the dispersion of the property among the several purchasers.(c) A junior mortgagee, suing for the

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property was injured by the defendant. It was left to the jury to find a verdict for the plaintiff's real and *bona fide* interest, and though the property taken was worth £21, the verdict was for one farthing. Cameron *v.* Wynch, 2 C. & K. 264.

(a) King *v.* Bangs, 120 Mass. 514. This was, to be sure, a mortgage of land; but the reasoning of the court would apply equally well to a mortgage of chattels.

(b) Goulet *v.* Asseler, 22 N. Y. 225.

(c) Welch *v.* Whittemore, 25 Me. 86; Googins *v.* Gilmore, 47 Me. 9; Ayer *v.* Bartlett, 9 Pick. 156; Forbes *v.* Parker, 16 Pick. 462; Manning *v.* Monaghan, 28 N. Y. 585.

conversion of the mortgaged property, recovers the value of his interest, that is, he can be compensated only for the value of the property above the prior mortgage.([a])

§ 82. **Between the parties to a mortgage of chattels.**— When the suit is between the parties to the mortgage, the plaintiff, whether he has been in possession or not, can, on the equitable principle already explained, recover compensation only for the injury done to his interest. Thus, when a mortgagor sues a mortgagee for prematurely seizing or selling the mortgaged chattel, his recovery is diminished by the amount of the debt.([b]) And where the mortgagee sues a mortgagor for conversion of the mortgaged property, the measure of damages is the amount of the debt and interest ([c]) up to the value of the property;([d]) and the measure of recovery is the same against one who stands in place of the mortgagor, as his vendee or attaching creditor.([e])

In an action of trover by a mortgagee of chattels

([a]) Straw *v.* Jenks, 43 N. W. Rep. 941 (Dak.).

([b]) Brierly *v.* Kendall, 17 Q. B. 937; Toms *v.* Wilson, 32 L. J. (N. S.) Q. B. 382, 4 B. & S. 442; McClure *v.* Hill, 36 Ark. 268; Jones *v.* Horn, 51 Ark. 19; Treat *v.* Gilmore, 49 Me. 34; Dahill *v.* Booker, 140 Mass. 308; Bearss *v.* Preston, 66 Mich. 11; Torp *v.* Gulseth, 37 Minn. 135; Kimball *v.* Marshall, 8 N. H. 291; Russell *v.* Butterfield, 21 Wend. 300; McAulay *v.* Allen, 20 Up. Can. C. P. 417.

([c]) Perrigo G. M. & T. Co. *v.* Grimes, 2 Col. 651; Bailey *v.* Godfrey, 54 Ill. 507; McFadden *v.* Hopkins, 81 Ind. 459; Parish *v.* Wheeler, 22 N. Y. 494; Hinman *v.* Judson, 13 Barb. 629; Warner *v.* Vallily, 13 R. I. 483; Williams *v.* Dobson, 26 S. C. 110; Ward *v.* Henry, 15 Wis. 239; Lowe *v.* Wing, 56 Wis. 31.

([d]) Keith *v.* Haggart, 33 N. W. Rep. 465 (Dak.); Ganong *v.* Green, 71 Mich. 1; Deal *v.* Osborne, 42 Minn. 102; Smith *v.* Phillips, 47 Wis. 202.

([e]) Sherman *v.* Finch, 71 Cal. 68; Albert *v.* Lindan, 46 Md. 334; Boyden *v.* Moore, 11 Pick. 362; Howe *v.* Bartlett, 8 All. 20; Ganong *v.* Green, 71 Mich. 1; Becker *v.* Dunham, 27 Minn. 32; Hamilton *v.* Lau, 24 Neb. 59; Carpenter *v.* Cummings, 40 N. H. 158; Williams *v.* Dobson, 26 S. C. 110; Boydston *v.* Morris, 71 Tex. 697; Chaffee *v.* Sherman, 26 Vt. 237; Clark *v.* Lamoreux, 70 Wis. 508.

against one who had bought them from the mortgagor, the defendant may show, in diminution of the mortgagee's special interest in the property, that other property was embraced in the mortgage, and that the plaintiff has reduced the same to possession.(a) So in an action by the mortgagee of goods, against an officer who has taken a part of them out of his possession under an attachment against the mortgagor, the defendant may show in mitigation that the mortgagee has collected his debt out of the residue.(b) On the other hand, where the mortgagee took possession of mortgaged property prematurely, and the mortgagor brought replevin, but the mortgagee's right to the property soon after vested, it was held that the mortgagor could only recover damages for detention of the property until the mortgagee's right to it became vested.(c)

The rule in this case is the same, whether the plaintiff is the legal owner or not; but the reduction rests on different grounds in the two cases. If the plaintiff has a lien only, his legal property is the lien, and he recovers damages for injury done to that: if he is the legal owner of the property he would on general principles be entitled to full damages, but to avoid circuity of action the amount he recovers is reduced by the amount of the defendant's interest.(d) If the plaintiff has neither legal ownership nor lien, but only an equitable interest in the property, he can recover nothing for injury to the property: his recovery must be upon the contract between the parties.

(a) Bailey *v.* Godfrey, 54 Ill. 507.

(b) Ward *v.* Henry, 15 Wis. 239.

(c) Deal *v.* Osborne, 42 Minn. 102.

(d) Peck *v.* Inlow, 8 Dana, 192; Parish *v.* Wheeler, 22 N. Y. 494, 511.

§ 83. **By the part owner of chattels.**—Where the interest of the plaintiff is a particular estate or a reversion in a chattel he can recover from one who injures the property only the amount he is personally injured, though he may be in possession; for his possession is for himself alone, and he has no fiduciary relation with the other owners. Thus the life-tenant of a chattel can recover, in an action for injury to it, only the amount of injury done to his interest;[a] and the remainder-man can recover compensation for the injury done to the reversion. In an instructive case of this sort[b] stock was converted during the continuance of the life, and the remainder-man brought action; but before trial the life-tenant died. It was held that the measure of damages was the value of the stock at the expiration of the life, not at the time of conversion. Where a party is entitled to recover on a bond as the *cestui que trust*, he can recover only the amount of his interest, although the obligee might have recovered for him a greater sum.[c]

Where one of two joint owners sues for injury to the property jointly owned, the defendant, though he neglect to plead in abatement, may show that the plaintiff is only a part owner, and the plaintiff can then recover damages only in proportion to his interest.[d] Since at law partners hold property simply as joint

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[a] McGowen *v.* Young. 2 Stew. 160; Strong *v.* Strong, 6 Ala. 345; Russell *v.* Kearney, 27 Ga. 96; Glascock *v.* Hays, 4 Dana 58; Lloyd *v.* Goodwin, 12 Sm. & M. 223.

[b] Caulkins *v.* Gas-Light Co., 85 Tenn. 683.

[c] Sweeney *v.* Lomme, 22 Wall. 208.

[d] Hillhouse *v.* Mix, 1 Root 246; Jones *v.* Lowell, 35 Me. 538; Dailey *v.* Grimes, 27 Md. 440, 451; Thompson *v.* Hoskins, 11 Mass. 419; Bartlett *v.* Kidder, 14 Gray 449; Sherman *v.* F. R. Iron Works Co., 5 All. 213; Zabriskie *v.* Smith, 13 N. Y. 322; Green *v.* Edick, 66 Barb. 564; Turnpike Co. *v.* Fry, 88 Tenn. 296.

owners, one partner can recover from one who injures the partnership property his proportionate share of the full compensation, no matter whether the partnership is or is not solvent, and without regard to the state of the partnership accounts.(a) Thus in an Illinois case the plaintiff, and one of the partners of the defendant's firm, purchased from the defendant a distillery business. The stock was represented to be much more valuable than it really was. The plaintiff and his partner gave their partnership notes for the amount. The partner absconded. It was held, that the plaintiff could only recover his proportion of the excess of the notes over the value of the property, although he had been obliged to pay all the notes.(b)

In these cases the possession is joint. In tenancy in common the possession, instead of being in both owners, may be in one only. If that is the case the part owner out of whose possession a chattel is wrongfully taken by a stranger recovers full compensation.(c)

Time to which Compensation may be Recovered.

§ 84. Damages must be recovered in a single action.— It is an elementary principle of the law that an injured party must not split his cause of action into various suits, but must include in his first suit all items of loss which the wrongful act caused him.

The defendant obstructed a watercourse and so overflowed the plaintiff's land, which comprised a tract of half a section. The plaintiff brought suit for the injury done to part of this land and recovered; he then brought another

(a) Crabtree *v.* Clapham, 67 Me. 326; Walsh *v.* Adams, 3 Den. 125; Berry *v.* Kelly, 4 Robt. 106; Foster *v.* Weaver, 118 Pa. 42.

(b) Schwabacker *v.* Riddle, 84 Ill. 517.

(c) Hasbrouck *v.* Winkler, 48 N. J. L. 431.

suit for the injury done another portion of the same half section. It was held that he could recover nothing more; for he must recover in the first suit all the damage he suffered from the defendant's act.(a) So several suits cannot be brought for a personal injury, even though new damage appear. All the damage must be estimated in one action.(b) The question was early considered by Lord Holt in a case of tort.[1] The plaintiff declared of a battery, alleging that he had previously brought an action for it against the defendant, and recovered £11, and no more; and that afterward part of his skull, by reason of the said battery, came out of his head, and for this subsequent damage the suit was brought. The defendant pleaded the recovery in bar and demurrer. And Shower, *pro querente*, argued, "that if a consequence will take away an action, for the same reason it will give an action." But judgment was given for the defendant, the whole court being of opinion "that the jury, in the former action, considered the nature of the wound, and gave damages for all the damage that it had done the plaintiff." The case was moved again, when Holt, C. J., said: "If this matter had been given in evidence as that which *in probability might have been* the consequence of the battery, the plaintiff would have *recovered damages for it.* The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in *aggravation of damages.*"

And where, in an action for breaches of a covenant, the plaintiff was entitled to damages accruing subsequently to the bringing of the suit, but under the erro-

[1] Fetter *v.* Beale, 1 Ld. Raym. 339, 692; s. c. 1 Salk. 11.

(a) Wichita & W. R.R. Co. *v.* Beebe, 39 Kas. 465. *Acc.* of a trespass, Pierro *v.* St. Paul & N. P. Ry. Co., 39 Minn. 451.

(b) Howell *v.* Goodrich, 69 Ill. 556.

neous instruction of the court, damages to the time of the trial only were given, it was held that this afforded no ground for bringing another action for the same breaches.(a)

It thus appears that fresh damages merely will not give a fresh action, and a judgment in a suit founded on a single act of tort, will be a conclusive bar to a second suit for the same injury, although harmful consequences have made themselves apparent subsequent to the first suit; as it will be held that in the first verdict the plaintiff recovered all he was entitled to claim. Hence the statute of limitations runs from the time of the breach. So where the plaintiff sued the defendant on a contract made in 1810, to deliver spring wheat, alleging that the plaintiff had resold the wheat to one Shephard as spring wheat, but that it was in fact winter wheat, and that in consequence thereof it failed; hereupon Shephard sued the plaintiff, and recovered a judgment, which the plaintiff paid in 1818, and then brought this suit. The statute of limitations was pleaded, and the Court of King's Bench held it a good bar, saying that the breach of contract was the gist of the action, and that the special damage was stated merely as a measure of the damages resulting from that cause of action; and Bailey, J., said: "If the plaintiff had failed in proving the special damage in the case, it would not have been a ground of nonsuit."[1]

§ 85. **Early rule different—Loss after action brought.**— The principle of allowing prospective loss to be compensated was not always recognized. "The general rule in personal actions," says Chief Baron Comyn, "is that

[1] Battley *v.* Faulkner, 3 B. & Ald. 288. It may, perhaps, be doubted whether the damage here complained of was not too remote to be taken into consideration, but the question does not appear to have been discussed.

(a) Winslow *v.* Stokes, 3 Jones L. 285.

damages are allowed only to the time of the action commenced."[1] "Judgments," says the Constitutional Court of South Carolina, "generally refer to the situation of the parties at the commencement of the suit. If at that time the plaintiff had no cause of action, he must suffer a nonsuit. It is then the defendant is informed of the wrong with which he is charged, and the redress which is demanded. The declaration, which is but an amplification of the writ, must set forth the form and manner of injury, to enable the defendant to file the pleas necessary to his defense, and the judgment must correspond with the pleadings. If new matter be introduced subsequent to the pleadings, the defendant may be surprised, and the judgment of the court may not conform to the pleadings."[2] So, too, in Massachusetts, it has been said: "The cases are decisive that by the common law the plaintiff can recover damages only to the time of bringing the action, and that in this respect there is no distinction between actions of covenant and of tort."[3] The rule arbitrarily limiting the damages to the commencement of the suit, was so long adhered to, that up to the time of Lord Mansfield, even in actions of assumpsit, it seems to have been the practice to compute the interest only to the time of the bringing of the action; that great judge, however, declared the true doctrine, and said: "It is agreeable to the principles of the common law, that wherever a duty has incurred pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given upon the action already depending." But "in trespass and in tort new actions may be brought as often as new injuries and

[1] Comyn's Digest, Damages, D; and Robert Pilfold's Case, 10 Coke 115*b*.
[2] Duncan *v.* Markley, 1 Harper 276.
[3] Powers *v.* Ware, 4 Pick. 106; Pierce *v.* Woodward, 6 Pick. 206. See, also, Catherwood *v.* Caslon, 1 Car. & Marsh. 431.

wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of."[1]

It was still later that the true rule was recognized in actions of tort. In an action for a libel, which had led to the plaintiff's arrest, both before and after the commencement of the suit, it was held that the defendant might insist that all that took place subsequent to the bringing of the action should be excluded from the consideration of the jury; but that after consenting to the admission of evidence in regard to what took place after the commencement of the suit, the jury were at liberty to take it into consideration.[2] In cases of contract the question was once raised whether the day of the breach was to fix the damages; that is, whether they were to be computed according to the state of things existing on that day, and on the assumption that such state of facts would not change during the time the agreement has to run, or whether proof should be gone into as to any fluctuations that might have taken place prior to the trial of the cause, and the rights of the parties determined by the precise facts.[3]

This theory was at the bottom of the case of Charles *v.* Altin,([a]) which will be discussed at large in a later chapter, and offers the only explanation of that decision. The theory is now nowhere held. In an action of assumpsit against an attorney for negligence, the Supreme Court of the United States said: "When the attorney was chargeable with negligence, his contract was violated, and the action might have been sustained

[1] Robinson *v.* Bland, 2 Burr. 1077, 1086.

[2] Goslin *v.* Corry, 7 M. & G. 343.

[3] This is rather a question of evidence, which we shall consider more at large hereafter.

([a]) 15 C. B. 46.

immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damages may extend to facts that occur and grow out of the injury, even up to the day of the verdict."[1]

In Kentucky, also, the rule is recognized that loss, accruing subsequent to the suit, may be recovered, where the subsequent damages are the very incident or accessory of the principal thing demanded, and no action can be maintained for them.[2] If there is a breach of contract, the right to nominal damages exists at once to vindicate the right, and suit may be brought; if those consequences of the act for which the law renders the party in default responsible, have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury;(a) but if at the time of trial the loss is still only probable, the verdict should be but for nominal damages.

§ 86. **Damages for prospective loss.**—Consequently the plaintiff in an action recovers compensation not only for such loss as has already accrued, but also for such loss as he can with reasonable certainty show will accrue in future. Thus in an action of covenant by trustees of a wife against the husband, on his covenant to pay off certain incumbrances within twelve months, although no special damage was laid or proved, it was held that the plaintiffs were entitled to a verdict for the whole amount of the incumbrances.[3]

In an action of contract the plaintiff recovers all that

[1] Wilcox *v.* Plummer, 4 Pet. 172, 182.
[2] Trigg *v.* Northcut, Lit. Sel. Cas. 772.
[3] Lethbridge *v.* Mytton 2 B. & A. 414.

(a) So in an action for breach of warranty: Dickey *v.* Weston, 61 N. H. 23.

he would have made to the time fixed for the completion of the contract.(a)

Where a tenancy at will is wrongfully terminated by the landlord, the tenant's damages are not restricted to the beginning of the suit, but he may recover such damages as are the direct result of his expulsion, up to the time when the tenancy might be lawfully determined.(b)

Prospective damages are frequently recovered in actions for personal injuries. Thus in such actions the plaintiff may recover for permanent loss of earning power, which includes both the pecuniary loss he has sustained and that he is likely to sustain during the remainder of his life,(c) or for future pain or permanent physical injury.(d) In an action for loss of service, the plaintiff may recover compensation for probable future loss during the continuance of the term of service.(e) So where one had let a slave for a specified time to another, from whose possession it was immediately taken by a third party, it was held, in Missouri, that the lessee might recover the value of the slave's services from the wrong-

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(a) Roper *v.* Johnson, L. R. 8 C. P. 167.

(b) Palmer *v.* Crosby, 1 Blackt. 139; Ashley *v.* Warner, 11 Gray 43.

(c) Barbour Co. *v.* Horn, 48 Ala. 566; Malone *v.* Hawley, 46 Cal. 409; Chicago *v.* Jones, 66 Ill. 349; Chicago *v.* Elzeman, 71 Ill. 131; Pittsburgh, C. & St. L. Ry. Co. *v.* Sponier, 85 Ind. 165; Ind. Car Co. *v.* Parker, 100 Ind. 181; Sheehan *v.* Edgar, 58 N. Y. 631; McLaughlin *v.* Corry, 77 Pa. 109; Fulsome *v.* Concord, 46 Vt. 135.

(d) Atlanta & W. P. R.R. Co. *v.* Johnson, 66 Ga. 259; Russ *v.* Steamboat War Eagle, 14 Ia. 363; Townsend *v.* Paola, 41 Kas. 591; Alexander *v.* Humber, 86 Ky. 565; Caldwell *v.* Murphy, 11 N. Y. 416; Curtis *v.* R. & S. R.R. Co., 18 N. Y. 534; Ganiard *v.* R. C. & B. R.R. Co., 50 Hun 22; Crank *v.* Forty-second St., M. & S. N. A. Ry. Co., 53 Hun 425; Birchard *v.* Booth, 4 Wis. 67; Fox *v.* St. John, 23 N. B. 244.

(e) Hodsoll *v.* Stallebrass, 11 A. & E. 301; Hatch *v.* Fuller, 131 Mass. 574; Plate *v.* N. Y. C. R.R. Co., 37 N. Y. 472; Cuming *v.* B. C. R.R. Co., 109 N. Y. 95; Whitney v. Clarendon, 18 Vt. 252.

doer for the whole term, although the suit was brought before it had ended.(a) And in an action against a surgeon for negligence in healing the plaintiff's broken leg, the plaintiff may recover compensation for inability to use the leg in the future;(b) and so in an action by a husband against a railway company for an injury to his wife, his expenses for her cure incurred after the bringing of the suit were allowed.(c) In a statutory action for the death of a human being, the plaintiff may recover compensation for the loss of future support.(d)

So where the defendant was employed as an attorney, to investigate securities on which a loan was to be made, and it was alleged that he had neglected to use proper care, and that the securities had proved defective, that a large amount of interest was lost, and that probably a portion of the principal would be also lost; the statute of limitations was pleaded, and it appeared that the examination of the title took place in 1814, but that the insufficiency was not discovered till 1820, up to which time the interest was paid. It was insisted that the statute ran, not from the time when the insufficient security was taken, but from the period when the special damage alleged in the declaration—namely, the loss of interest—accrued. But the statute was held a good bar, and Holroyd, J., said: "If the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the *prob-*

(a) Moore *v.* Winter, 27 Mo. 380.

(b) Chamberlain *v.* Porter, 9 Minn. 260.

(c) Hopkins *v.* A. & St. L. R.R. Co., 36 N. H. 9.

(d) U. P. Ry. Co. *v.* Dunden, 37 Kas. 1; Houghkirk *v.* Del. & Hudson Canal Co., 92 N. Y. 219; Eames *v.* Brattleboro, 54 Vt. 471; Hoppe *v.* C. M. & St. P. Ry. Co., 61 Wis. 357; Lawson *v.* C. St. P. M. & O. Ry. Co., 64 Wis. 447; Johnson *v.* C. & N. W. Ry. Co., 64 Wis. 425.

able loss which the plaintiff was likely to sustain from the invalidity of the security."[1] And the authority of this case was recognized in the Court of Chancery, by Mr. Vice-Chancellor Wigram.[2]

In Goodrich *v.* Dorset Marble Co.,(a) the defendant, by obstructing a stream, caused the water to overflow the plaintiff's meadow. It was held that he might recover compensation for a loss caused by the overflow, which did not become apparent until after the bringing of the action. So where the defendant negligently set fire to the plaintiff's grass-land, and the roots of the grass were destroyed, damages for the entire injury were held to be recoverable at once.(b)

§ 87. **Continuing agreements.**—Where an agreement covers a long period and is broken, there is no doubt that suit may be brought at once. Nor is there any doubt that prospective damages for the whole time covered by the contract may be obtained. So in Massachusetts, in suits on the covenant of warranty and against incumbrances, the plaintiff may recover the amount fairly and justly advanced to remove the incumbrance, though paid after the suit begins.[3]

The principle is now universally recognized that a loss that happens after action brought, as a direct consequence of the wrong for which the action was brought, may be compensated, though it had not happened or could not be foreseen when the action was brought.(c)

[1] Howell *v.* Young, 5 B. & C. 259, 268. *Acc.* Gillon *v.* Boddington, 1 R. & M. 161.

[2] Smith *v.* Fox, 6 Hare 386, 12 Jur. 130. See 12 Wms. Saund. 169.

[3] Leffingwell *v.* Elliott, 10 Pick. 204; Brooks *v.* Moody, 20 Pick. 474.

(a) 60 Vt. 280.

(b) Fort Worth & N. O. Ry. Co. *v.* Wallace, 74 Tex. 581.

(c) Pendergast *v.* M'Caslin, 2 Ind. 87; Gennings *v.* Norton, 35 Me. 308; Whitney *v.* Slayton, 40 Me. 224; Hagan *v.* Riley, 13 Gray 515.

§ 88. **Renewed injury requires a new action.**—Both in contract and tort, where the injury for which suit has been brought is repeated, a new action must be brought to recover compensation for the new injury. No action can be brought to redress an injury before it happens; consequently no injury will be redressed which was inflicted after the date of the writ. So, in slander, no evidence can be given of words spoken after the commencement of the action.[1]

The renewed injuries may consist of a series of similar acts, as, for instance, trespassing upon the plaintiff's land every day. In such a case each act is plainly a new injury, and successive actions must be brought in order to obtain redress. But the renewed injuries may be caused by a single continuing act, as, for instance, obstructing a stream and flowing the plaintiff's land. In such a case, if the right of the plaintiff continues to exist, each moment's continuance of the wrong is a new injury. "In the case of a personal injury, the act complained of is complete and ended before the date of the writ. It is the damage only which continues and is recoverable, because it is traced back to the act; while in the case of a nuisance it is the act which continues, or, rather, is renewed day by day. The duty which rests upon the wrong-doer to remove a nuisance causes a new trespass for each day's neglect." ([a])

§ 89. **Continuing breach of contract.**—A single act of the defendant may be of such a nature as to give rise to a continuous breach of his contract with the plaintiff, which, however, the defendant may bring to a close by resuming performance. In such a case each moment

[1] Root *v.* Lowndes, 6 Hill 518; Keenholts *v.* Becker, 3 Den. 346.

([a]) Danforth, J., in Rockland Water Co. *v.* Tillson, 69 Me. 255, 268.

during which the injury is allowed to continue is really a new breach; and if action is brought during the continuance of the injury, compensation can be recovered for such loss only as is caused before the beginning of the action.

Thus, where a contract to support the plaintiff is broken, compensation is recoverable only to the date of the writ;[a] and so, on breach of contract not to engage in business in a certain place, compensation can be recovered only for loss suffered before the date of the writ.[b] So, on breach of contract to keep a gate in repair, damages are recoverable only to the date of the writ, and for disrepair after that time a new action may be brought.[c] Additional damage from the continued withholding of the conveyance of real estate sustained after the commencement of a suit for breach of a contract to convey it cannot be recovered in that action, but may in a subsequent one[d]

§ 90. **Damages recoverable for act destroying a contract.** —The wrongful act of the defendant may be of such a nature as to put an end to the plaintiff's right at once, though the consequence is a continuing one. In such a case compensation may be recovered at once for the whole loss.

Thus where a breach of contract, though of a sort to be regarded as a continuing one, so goes to the essence of the contract and destroys its object as to justify the plaintiff in considering the contract at an end, compensation may be recovered in one action for the entire loss. Whether or not a breach puts an end to the con-

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[a] Fay *v.* Guynon, 131 Mass. 31.
[b] Hunt *v.* Tibbets, 70 Me. 221.
[c] Beach *v.* Crain, 2 N. Y. 86.
[d] Warner *v.* Bacon, 8 Gray 397.

tract is, in case of doubt, a question of fact for the jury.(a) Where a defendant was sued on a contract to keep certain cattle-passes in repair, the court refused to allow prospective damages, since, if in the future the defendant should fail to repair, there would be a new injury and a new cause of action would accrue; (b) but in another case, where the contract was to repair machinery in a mill, it was held that entire damages could be recovered, both past and prospective,(c) for the facts showed that the contract could not be kept alive.

We have seen that a contract to support is ordinarily a continuing one. But a breach of contract to support the plaintiff for life is often of such a nature that the plaintiff could not reasonably be expected to return and live with the defendant afterwards even if he were allowed to do so. In such a case the breach would be a total one, and the plaintiff could recover compensation for prospective as well as past loss.(d) So in the common case of a contract of service, the plaintiff may usually bring suit before the term of service expires and recover compensation for his whole loss.(e)

§ 91. **Continuing tort.**—Just as a single wrongful act may give rise to an indefinite number of breaches of contract, so it may give rise to a continuous series of torts which can be brought to an end by the defendant discontinuing the act.

As stated above, a wrongful act may create a nuisance which will continue, and each moment of its continuance

(a) Shaffer *v.* Lee, 8 Barb. 412; Remelee *v.* Hall, 31 Vt. 582.

(b) Phelps *v.* N. H. & N. Co., 43 Conn. 453.

(c) Cooke *v.* England, 27 Md. 14.

(d) Amos *v.* Oakley, 131 Mass. 413; Parker *v.* Russell, 133 Mass. 74; Wright *v.* Wright, 49 Mich. 624; Shaffer *v.* Lee, 8 Barb. 412.

(e) Sutherland *v.* Wyer, 67 Me. 64; Lamoreux *v.* Rolfe, 36 N. H. 33. *Contra*, Gordon *v.* Brewster, 7 Wis. 355.

will be a new tort. If in such case action is brought, compensation can be had only for loss caused before the bringing of the action.([a]) Thus in an action for flowing lands,([b]) or for diverting ([c]) or polluting ([d]) a watercourse, compensation can be had only for loss accruing before the date of the writ; and the same is true in the case of an action for wrongfully placing a structure on the plaintiff's land,([e]) and for recovery of rents and profits against a disseizor.([f])

An excavation by the owner of land is not a tort, but causing another's land to fall by such an excavation is a tort. So where one excavation causes land to fall several times, each fall is a separate tort, and action may be brought for it.([g])

But where the plaintiff has an easement of support for its structure in the defendant's land, and the defendant by his excavation causes the structure to fall, the injury caused by the excavation is committed once for all, and entire damages may be recovered for it.([h])

([a]) Denver C. I. & W. Co. *v.* Middaugh, 12 Col. 434; Duncan *v.* Markley, 1 Harper, 276; Cobb *v.* Smith, 38 Wis. 21; Stadler *v.* Grieben, 61 Wis. 500. In North Carolina by interpretation of a provision of the code it has been held that in a case of continuing trespass damages may be recovered to the time of trial; but this is recognized to be a departure from the common law. Pearson *v.* Carr, 97 N. C. 194; Dailey *v.* Dismal Swamp Canal Co., 2 Ired. L. 222.

([b]) Polly *v.* McCall, 1 Ala. Sel. Cas. 246; S. C. 37 Ala. 20; Benson *v.* Chicago & A. R.R. Co., 78 Mo. 504; Nashville *v.* Comar, 88 Tenn. 415.

([c]) Greenup *v.* Stoker, 7 Ill. 688; Langford *v.* Owsley, 2 Bibb 215; Dority *v.* Dunning, 78 Me. 381; Shaw *v.* Etheridge, 3 Jones L. 300.

([d]) Sanderson *v.* Pa. Coal Co., 102 Pa. 370.

([e]) Holmes *v.* Wilson, 10 A. & E. 503; Esty *v.* Baker, 48 Me. 495; Russell *v.* Brown, 63 Me. 203.

([f]) Larrabee *v.* Lumbert, 36 Me. 440.

([g]) Mitchell *v.* Darley Main Colliery Co., 14 Q. B. Div. 125, 11 App. Cas. 127, overruling Lamb *v.* Walker, 3 Q. B. D. 389; McGuire *v.* Grant, 25 N. J. L. 356; Snarr *v.* Granite Curling and Skating Co., 1 Ont. 102.

([h]) Rockland Water Co. *v.* Tillson, 69 Me. 255; Conlon *v.* McGraw, 66 Mich. 194.

So in an early action on the case, where the plaintiff declared for procuring his apprentice to depart from his service, and for the loss of his service for the whole residue of the term of his apprenticeship, and the jury assessed damages generally, judgment was arrested, because it appeared that the term was not expired at the commencement of the suit.(a)

In New York, in an action to recover damages for enticing the plaintiff's son away, and inducing him to enlist in the army for three years, as a substitute for the defendant, it was held by the Supreme Court that the plaintiff could only recover to the time of the commencement of the action, or at most to the time of the trial.(b)

So in an action for enticing an apprentice where it appeared that the apprentice was still in the neighborhood, it was held in North Carolina that damages could be recovered only to the date of the writ.(c)

Where, however, an action is brought to abate a nuisance, and the nuisance is in fact abated before the trial, damages are given up to the time the nuisance was abated, and not merely to the date of the writ, although the tort was a continuing one.(d) This is a departure from principle, to be justified on account of its practical convenience.

§ 92. **By trespass on plaintiff's land.**—Where injury is caused by a trespass on the plaintiff's land, since the defendant cannot remedy the wrong without another trespass, the injury is not continuing, but inflicted once for all, and full compensation is to be recovered in one ac-

(a) Hambleton *v.* Veere, 2 Saund. 169; *acc.* Lewis *v.* Peachy, 1 H. & C. 518.

(b) Covert *v.* Gray, 34 How. Pr. 450. Recovery should clearly not be allowed to time of trial.

(c) Moore *v.* Love, 3 Jones L. 215.

(d) Fritz *v.* Hobson, 14 Ch. D. 542; Comminge *v.* Stevenson, 76 Tex. 642.

tion. So where the defendant made an excavation in the plaintiff's land, the entire damage was awarded in a single action.(a) Where the defendant broke through into the plaintiff's mine, which afterwards was flooded through the breach, it was held that the entire damage must be recovered in one action; (b) and the same decision was reached where the defendant wrongfully filled up the plaintiff's pond,(c) and where he threw up an embankment on the plaintiff's land, wrongfully claiming that it was a highway.(d)

§ 93. By unauthorized private structure or use of land.— If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action.

So where a stream is wrongfully obstructed by a private dam or canal, the plaintiff injured by it can recover compensation only to the date of the writ.(e) So in an action for obstructing the plaintiff's lights the plaintiff can recover only to the date of the writ; (f) and the same is true where the defendant wrongfully filled a canal,(g)

(a) Clegg *v.* Dearden, 12 Q. B. 576; Kansas P. Ry. Co. *v.* Mihlman, 17 Kas. 224.

(b) National Copper Co. *v.* Minn. Mining Co., 57 Mich. 83; Lord *v.* Carbon Iron Mfg. Co., 42 N. J. Eq. 157; Williams *v.* Pomeroy Coal Co., 27 Oh. St. 583.

(c) Finley *v.* Hershey, 41 Ia. 389.

(d) Ziebarth *v.* Nye, 42 Minn. 541.

(e) Langford *v.* Owsley, 2 Bibb. 215; Williams *v.* Camden and Rockland Water Co., 79 Me. 543; Van Hoozier *v.* Hannibal & St. J. R.R. Co., 70 Mo. 145; Thayer *v.* Brooks, 17 Oh. 489; Bare *v.* Hoffman, 79 Pa. 71.

(f) Union Trust Co. *v.* Cuppy, 26 Kas. 754; Blunt *v.* McCormick, 3 Den. 283; Spilman *v.* Roanoke Nav. Co., 74 N. C. 675; Winchester *v.* Stevens Point, 58 Wis. 350; Pugsley *v.* Ring, Cass. Can. Dig. 138.

(g) Cumberland & Oxford Canal *v.* Hitchings, 65 Me. 140.

flowed the plaintiff's land,(a) erected a building which was a nuisance,(b) laid out a highway wrongfully around the plaintiff's toll-gate, thus depriving the plaintiff of tolls.(c)

§ 94. **For a tort causing permanent injury.**—The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass. The subject is one which has become of much importance in the last few years, in connection with the construction of railroads and great public works.

Courts of the highest authority have differed on the question. It is urged on the one hand, with much propriety, that the law will not proceed upon the assumption that a nuisance or illegal conduct will continue forever, and therefore that entire damages will not be given, as for a permanent injury, no matter how lasting it seems destined to be. On the other hand it is urged that the law will not allow the unnecessary multiplication of suits, and will if possible settle the entire controversy in a single suit; and that if the injury is proved with reasonable certainty to be permanent, damages should be allowed for the whole loss, past and future. If this view is adopted it is to be noted that as a result the defendant will by satisfaction of the judgment acquire a right to do the act previously wrongful; but this is no anomaly, for the same is true, for instance, on satisfaction of a judgment in an action of trover for refusal to deliver a chattel, which is of a very analogous nature.

§ 95. **For injury caused by lawful permanent structure or use of land.**—If the injury is caused by erecting a struc-

(a) Hargreaves *v.* Kimberly, 26 W. Va. 787.
(b) Barrick *v.* Schifferdecker, 48 Hun 355.
(c) Cheshire Turnpike Co. *v.* Stevens, 13 N. H. 28.

ture or making a use of land which the defendant has a right to continue, the injury is regarded as committed once for all, and action must be brought to recover the entire damage, past and future.

So in Stodghill *v.* Chicago, B. & Q. R.R. Co.(a) the Supreme Court of Iowa said: "When a nuisance is of such character that its continuance is necessarily an injury, and that when it is of a permanent character that will continue without change from any cause but human labor, the damage is original and may be at once fully estimated and compensated; . . . . successive actions will not lie. The damages being entire and susceptible of immediate recovery, plaintiff could not divide his claim and maintain successive actions. . . . . It was the duty of plaintiff to have excepted and appealed."

A typical instance is an action against a railroad company for a nuisance caused by its embankment or other permanent structure. In such case, when the Constitution permits recovery, the great weight of authority is to the effect that the injured party may, and therefore must, recover compensation in one action for the entire loss.(b) And where the building and operation of the railroad produces a nuisance, as by polluting the air by smoke, or by obstructing a street by its tracks lawfully located, the rule is generally held to be the same.(c) In some cases it is held that the plaintiff *may* recover prospective damages,

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(a) 53 Ia. 341; *acc.* Van Orsdol *v.* B. C. R. & N. Ry. Co., 56 Ia. 470.

(b) Chicago & E. I. R.R. Co. *v.* Loeb, 118 Ill. 203, and cases cited; Indianapolis B. & W. Ry. Co. *v.* Eberle, 110 Ind. 542; Fowle *v* New Haven & N. R.R. Co., 112 Mass. 334: Troy *v.* Cheshire R.R. Co., 23 N. H. 83; Knapp *v.* Great W. Ry. Co., 6 Up. Can. C. P. 187. So in case of the erection of a dock: Rust *v.* Victoria Graving Dock Co., 36 Ch. Div. 113.

(c) Chicago & E. I. R.R. Co. *v.* Loeb, 118 Ill. 203; Cadle *v.* Muscatine W. R.R. Co., 44 Ia. 11; Jeffersonville, M. & I. R.R. Co. *v.* Esterle, 13 Bush 667.

treating the injury as a permanent one.[a] And if he may, it is clear that he must. Where, however, the company can institute condemnation proceedings, and especially if such proceedings have actually been instituted since the bringing of the action,[b] it has been held that damages in the action of trespass can be recovered only to the date of the writ.[c] In a few States it is held that even a nuisance caused by a permanent railroad structure is continuous, and compensation can be recovered only for loss to the date of the action.[d] Of course, if the structure or the use of it is unauthorized by law, it is not to be supposed permanent, and compensation is recovered only for loss to date of writ.[e]

Where any other lawful work of a permanent nature causes injury to the plaintiff for which he may recover, the rule is the same, and he must recover all his damages in one action. So damages for the enlargement of a

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[a] Central B. U. P. R.R. Co. *v.* Andrews, 26 Kas. 702; Wichita & W. R.R. Co. *v.* Fechheimer, 36 Kas. 45,

[b] Anderson, L. & St. L. R.R. Co. *v.* Kernodle, 54 Ind. 314; Sherman *v.* Milwaukee, L. S. & W. R.R. Co., 40 Wis. 645.

[c] Callanan *v.* Port Huron & N. W. Ry. Co., 61 Mich. 15.

[d] Omaha & R. V. R.R. Co. *v.* Standen, 22 Neb. 343; Uline *v.* New York C. & H. R. R.R. Co., 101 N. Y. 98, following a long line of New York cases. In Pond *v.* Met. El. Ry. Co., 112 N. Y. 186, the court seemed to regret that the law was so established by authority, and the rule is practically neutralized by allowing a petition for injunction to be inserted, making it an equitable action; damages are then given to the time of trial, and the defendant is required to give reasonable compensation for the future or to be enjoined, as in Henderson *v.* New York C. R.R. Co., 78 N. Y. 423, or by allowing the parties to agree upon damages for the whole period, as in Lahr *v.* Met. El. R.R. Co., 104 N. Y. 268. Uline *v.* N. Y. C., etc., R.R. Co. is followed in the latest cases: Ottenot *v.* New York, L. & W. Ry. Co., 119 N. Y. 603. This whole subject is discussed at length in a later chapter in connection with the rules relating to condemnation proceedings.

[e] Frith *v.* Chicago, D. & M. Ry. Co., 45 Ia. 406; Cain *v.* C. R. I. & P. Ry. Co., 54 Ia. 255; Adams *v.* H. & D. R.R. Co., 18 Minn. 260; Harmon *v.* L. N. O. & T. R.R. Co., 87 Tenn. 614; Ford *v.* Chicago & N. W. R.R. Co., 14 Wis. 609; Carl *v.* Sheboygan & F. R.R. Co., 46 Wis. 625.

public canal ([a]) or for constructing a sewer ([b]) or a culvert through a railway embankment ([c]) must be recovered in a single action.

If a permanent work rightfully done by public authority is yet so negligently done as to cause continuing injury to the plaintiff, it is to be supposed that the negligence will be remedied, and the plaintiff can therefore recover only for loss to the date of his writ.([d])

([a]) Queen *v.* Hubert, 14 Can. 737.

([b]) Maysville *v.* Stanton, 14 S. W. Rep. 675 (Ky.).

([c]) Kansas P. Ry. Co. *v.* Mihlman, 17 Kas. 224 ; Patterson *v.* G. W. Ry. Co., 8 Up. Can. C. P. 89.

([d]) Eufaula *v.* Simmons, 86 Ala. 515 ; Duryea *v.* Mayor, 26 Hun 120. *Contra*, North Vernon *v.* Voegler, 103 Ind. 314 ; Powers *v.* Council Bluffs, 45 Ia. 652.

CHAPTER III.

NOMINAL DAMAGES.

§ 96. The common law relieves only actual injury.
97. Damage inferred from the fact of wrong done.
98. Nominal damages for the infringement of a right.
99. Nominal damages establish title.
100. Application of the rule in torts: English cases.
101. Application of the rule in torts: American cases.
102. In actions upon patents.
§ 103. In actions against public officers.
104. General principle in actions of tort.
105. Actions of contract: English cases.
106. Actions of contract: American cases.
107. Where no loss is inflicted, damages must be nominal.
108. Nominal damages as affecting costs.
109. Error in the disallowance of nominal damages.

§ 96. **The common law relieves only actual injury.**—*Before proceeding to consider the measure of legal compensation in cases where actual loss is sustained, it will be proper to examine the rule of *Nominal* Damages as contra-distinguished from *Substantial* Damages.

We shall have frequent occasion hereafter to notice that the common law, as a general rule, only gives actual compensation in cases of actual injury. The object of the suit is to obtain remuneration for loss actually sustained. If it appear that though the defendant is in fault, still that the plaintiff is not injured, he can have no relief. It is *injuria sine damno.* As far back as the Year Books, it is said, "If a man forge a bond in my name, I can have no action on the case yet; but if I am sued, I may, for the wrong and damage, though I may

avoid it by plea."[1] And so Lord Hobart, C. J., says, "There must be not only a thing done amiss, but also a damage either already fallen upon the party, or else inevitable."[2] Equity often proceeds, *quia timet*, in the exercise of her preventive powers to arrest the threatened injury, and there were some early and now obsolete proceedings of the same character at law;[3] but, as a general rule, it may at present be considered well settled that the relief of the common law is only to be obtained by those who have suffered actual injury. This proposition is, however, subject to the modification which we shall now proceed to consider in relation to nominal damages.

§ 97. **Damage inferred from the fact of wrong done.**— Wherever the breach of an agreement or the invasion of a right is established, the English law infers some damage to the plaintiff; and if no evidence is given of any particular amount of loss, it declares the right by awarding what it terms nominal damages, being some very small sum, as a farthing, a penny, or sixpence—*Ubi jus, ibi remedium.* "Every injury," said Lord Holt, "imports a damage."[4] So again, in the same case as elsewhere reported, his Lordship said:

"My brother Powell, indeed, thinks that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely, every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage where a man is thereby hindered of

[1] 19 H. 6, 44.

[2] Waterer *v.* Freeman, Hobart, 266.

[3] "And note," says Lord Coke, "that there be six writs in law that may be maintained, *quia timet*, before any molestation, distresse or impleading, as 1. A man may have his writ of *mesne* (whereof Littleton here speaks), before he be distreyned. 2. A *Warrantia Cartæ* before he be impleaded. 3. A *Monstraverunt* before any distresse or vexation. 4. An *Audita Querela* before any execution sued. 5. A *Curia Claudenda* before any default of inclosure. 6. A *ne injuste vexes* before any distresse or molestation. And these be called *brevia anticipantia*, writs of prevention."—Coke, Lit. 100*a*. Story's Equity Jurisprudence, §§ 730 and 825.

[4] Ashby *v.* White, 1 Salk. 19.

his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage, for it is an invasion of his property, and the other has no right to come there."[1]

"Wherever," says Mr. Sergeant Williams, "any act injures another's right, and would be evidence in future in favor of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury."[2]**

§ 98. **Nominal damages for the infringement of a right.**— It is now well established that nominal damages may be recovered for the bare infringement of a right, or for a breach of contract, unaccompanied by any actual damage.(a) To state when rights are infringed, and conse-

[1] 2 Ld. Raym. 938, 955. [2] Mellor *v.* Spateman, 1 Saund. 346*b*.

(a) Marzetti *v.* Williams, 1 B. & A. 415; Feize *v.* Thompson, 1 Taunt. 121; Barker *v.* Green, 2 Bing. 317; Nosotti *v.* Page, 10 C. B. 643; Watts *v.* Phœnix Mut. L. Ins. Co., 16 Blatch. 228; Bagby *v.* Harris, 9 Ala. 173; Drum *v.* Harrison, 83 Ala. 384; Barlow *v.* Lowder, 35 Ark. 492; Browner *v.* Davis, 15 Cal. 9; Hancock *v.* Hubbell, 71 Cal. 537; Kenny *v.* Collier, 79 Ga. 743; Burnap *v.* Wight, 14 Ill. 301; McConnel *v.* Kibbe, 33 Ill. 175; Dent *v.* Davison, 52 Ill. 109; Rosenbaum *v.* McThomas, 34 Ind. 331; Wimberg *v.* Schwegeman, 97 Ind. 528; Madison County *v.* Tullis, 69 Ia. 720; Webb *v.* Gross, 79 Me. 224; Brown *v.* Perkins, 1 All. 89; Smith *v.* Whiting, 100 Mass. 122; McKim *v.* Bartlett, 129 Mass. 226; Shattuck *v.* Adams, 136 Mass. 34; Cowley *v.* Davidson, 10 Minn. 392; Potter *v.* Mellen, 36 Minn. 122; Runlett *v.* Bell, 5 N. H. 433; French *v.* Bent, 43 N. H. 448; Golden *v.* Knapp, 41 N. J. L. 215; Taylor *v.* Read, 4 Paige 561; Quin *v.* Moore, 15 N. Y. 432; Pierce *v.* Hosmer, 66 Barb. 345; Colt *v.* Owens, 47 N. Y. Super. Ct. 430; Lawrence *v.* Kemp, 1 Duer 363; Shannon *v.* Burr, 1 Hilt. 39; Bond *v.* Hilton, 2 Jones L. 149; Ledbetter *v.* Morris, 3 Jones L. 543; Kimel *v.* Kimel, 4 Jones L. 121; White *v.* Griffin, 4 Jones L. 139; Anders *v.* Ellis, 87 N. C. 207, Coe *v.* Peacock, 14 Oh. St. 187; Coopers *v.* Wolf, 15 Oh. St. 523; Hutchinson *v.* Schimmelfeder, 40 Pa. 396; Hogg *v.* Pinckney, 16 S. C. 387; Seat *v.* Moreland, 7

quently when nominal damages are recoverable, would be to recapitulate the whole *corpus juris*. A few additional illustrations, however, may be given. In Tootle *v.* Clifton,[a] the wrong complained of was the erection by the defendant of an embankment on his own land, whereby the surface water accumulating on the land of the plaintiff was prevented from flowing off in its natural course and caused to flow off in a different direction over land of the plaintiff. The plaintiff was allowed to maintain the action, and recover nominal damages, although not actually injured. So the reversioner can recover nominal damages on the general covenant to repair, although he has not suffered any substantial damage.[b] In Mississippi, if a passenger on a railroad train is carried beyond his destination he can recover nominal damages.[c] In libel the plaintiff can recover nominal damages.[d]

If the defendant pending suit pays the debt or returns the property converted, and the payment or return is accepted by the plaintiff, nominal damages may be recovered.[e]

§ 99. **Nominal damages establish title.**—* In regard to the right invaded, a verdict and judgment for the smallest amount is as effectual as any sum, however large; for it establishes the fact of the plaintiff's title. And in the common case of trespass to lands, the main object usually

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Humph. 575; Hope *v.* Alley, 9 Tex. 394; Eaton *v.* Lyman, 30 Wis. 41; M'Leod *v.* Boulton, 3 Up. Can. Q. B. 84; Doan *v.* Warren, 11 Up. Can. C. P. 423; Doe *v.* Ausman, 1 R. & J. Ont. Dig. 989; Morrow *v.* Waterous, 24 N. B. 442.

[a] 22 Oh. St. 247.

[b] Williams *v.* Williams, L. R. 9 C. P. 659.

[c] Thompson *v.* N. O. J. & G. N. R.R. Co., 50 Miss. 315.

[d] Kelly *v.* Sherlock, L. R. 1 Q. B. 686.

[e] Conroy *v.* Flint, 5 Cal. 327; Shattuck *v.* Adams, 136 Mass. 34. But in England it is decided that judgment should be given for the defendant. Thame *v.* Boast, 12 Q. B. 808.

being to determine the right, this principle becomes very important. In many of these cases it might seem at first sight that the maxim *injuria sine damno* applied, and that the law would refuse redress.** But besides enforcing the principle that wherever there is a wrong there should be a remedy, this rule of giving nominal damages for the breach of a contract may settle the question of title or determine rights of the greatest importance.(a) *As has been clearly said by the Supreme Court of Connecticut, in an action for flowing lands, "An act which occasions no other damage than putting at hazard those rights, which, if the act were acquiesced in, would be lost by lapse of time, is a sufficient ground of action."[1]

So, again, it has been said in Maine, speaking of the flowage of lands, "Generally, when one encroaches on the inheritance of another the law gives a right of action, and even if no actual damages are proved, the action will be sustained and nominal damages recovered; because, unless that could be done, the encroachment acquiesced in might ripen into a legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title."[2]

So, in Pennsylvania, in trespass for flowing lands, it was held "that the law implies damage from flooding the ground of another, though it be in the least possible degree, and without actual prejudice. But where the law implies the injury, it also implies the lowest damage."[3] ** And the rule is generally recognized.(b)

[1] Chapman *v.* Thames Manuf. Co., 13 Conn. 269; *acc.* Bassett *v.* Salisbury Manuf. Co., 28 N. H. 438.

[2] Hathorne *v.* Stinson, 12 Me. 183; Seidensparger *v.* Spear, 17 Me. 123.

[3] Pastorius *v.* Fisher, 1 Rawle 27; Ripka *v.* Sergeant, 7 W. & S. 9.

(a) Patrick *v.* Greenaway, 1 Wms. Saunds. 346 b, note; Devendorf *v.* Wert, 42 Barb. 227.

(b) Whipple *v.* Cumberland Manuf. Co., 2 Story 661; Stein *v.* Burden, 24

§ 100. **Application of the rule in torts—English cases.**— * In an early English case, well known as that of *The Tunbridge Wells Dippers*,[1] an action on the case was brought by the plaintiffs, who were dippers at Tunbridge Wells, against the defendants for dipping without being duly appointed; and on the subject of damage, "there was no proof of the defendants having received any gratuity, other than general evidence that the employment of dipper is attended with profits which arise from the voluntary contribution of company resorting to Tunbridge Wells." The Court of Common Pleas, in noticing the objection, said, "There is a real damage to the dippers in depriving them of some gratuity which they would otherwise have received, perhaps more than they might truly deserve for their labor and pains. Besides, an action upon the case will lie for a *possibility* of a damage and an injury; as for persuading A. not to come and sell his wares at the market of B., the lord of the market may have his action."

So, again, subsequently in an action on the case for a surcharge of common, it was held that the plaintiff need not show that he turned on any cattle of his own at the time of the surcharge, but only that he could not have

[1] Weller *v.* Baker, 2 Wils. 414.

Ala. 130; Ulbricht *v.* Eufaula Water Co., 86 Ala. 587; Parker *v.* Griswold, 17 Conn. 288; Plumleigh *v.* Dawson, 6 Ill. 544; Blanchard *v.* Baker, 8 Me. 253; Munroe *v.* Gates, 48 Me. 463; Bolivar Manuf. Co. *v.* Neponset Manuf. Co., 16 Pick. 241; Newhall *v.* Ireson, 8 Cush. 595; Stowell *v.* Lincoln, 11 Gray 434; Lund *v.* New Bedford, 121 Mass. 286; Hooten *v.* Barnard, 137 Mass. 36; Dorman *v.* Ames, 12 Minn. 451; Truckee Lodge *v.* Wood, 14 Nev. 293; Amoskeag Manuf. Co. *v.* Goodale, 46 N. H. 53; Crooker *v.* Bragg, 10 Wend. 260; Kimel *v.* Kimel, 4 Jones L. 121; Kemmerer *v.* Edelman, 23 Pa. 143; Delaware & Hudson Canal Co. *v.* Torrey, 33 Pa. 143; Graver *v.* Sholl, 42 Pa. 58; Tuthill *v.* Scott, 43 Vt. 525; Mitchell *v.* Barry, 26 Up. Can. Q. B. 416; Plumb *v.* McGannon, 32 Up. Can. Q. B. 8; Warren *v.* Desilppes, 33 Up. Can. Q. B. 59.

enjoyed his common so beneficially as he might; and Nares, J., commenting on the Dippers' case, said it was there held that a "*probable*" damage is a sufficient injury on which to ground an action.[1] And "probable" is, perhaps, the more correct phrase. An invasion of right being shown, the law holds injury to be a *probable* result, and therefore gives judgment against the wrong-doer. In other words, it presumes some damage to have resulted from the wrong. And the principle was adhered to by the King's Bench in an action on the case for injuries to a right of common, the jury having found a verdict of one farthing, and a motion to set aside the verdict and to enter a nonsuit being denied.[2]

But in a suit brought by the owner of a house against a lessee for opening a door without leave, the premises not being in any way injured or weakened by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say whether the plaintiff's reversionary interest had, in point of fact, been prejudiced.[3] This case, however, does not present any exception to the general rule, for the court evidently considered that a verdict for nominal damages would have been right if there had been any proof of the plaintiff's *title* being affected. So, again, in the King's Bench, in an action on the case for the fraudulent imitation of the plaintiff's trade-marks; the jury having found a verdict, with one farthing damages, a motion was made to enter a nonsuit; but the rule was refused, and Littledale, J.,

[1] Wells *v.* Watling, 2 W. Black. 1233. By this decision a dictum of Lord Coke, in Robert Marys's case, was overruled. 9 Co. 111*b*, 113. "So," says Lord Coke, "that if the trespass *be so small* that the commoner has not any loss, but sufficient in ample manner remains for him, he shall not have any action for it."

[2] Pindar *v.* Wadsworth, 2 East 154. We shall hereafter see that this principle does not apply in cases of waste, and that if the damages there be purely nominal, the defendant may enter judgment. Harrow School *v.* Alderton, 2 B. & P. 86.

[3] Young *v.* Spencer, 10 B. & C. 145.

said, "The act of the defendants was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right."[1]

And in the same court, in an action on the case brought by a tenant against his landlord, for illegally distraining for more rent than was due, it appearing that the proceeds of the sale were insufficient to satisfy the rent actually in arrears, the jury found a verdict for the plaintiff, with one shilling damages. A motion was made to enter a nonsuit, but it was denied, and Denman, C. J., said, "There was a wrongful act of the defendant, and though by reason of the value of the goods taken falling short of the actual rent due, no real damage was sustained, yet there was a legal damage and cause of action, for which the plaintiff was entitled to a verdict."[2] This case carries the principle of the English law to its extreme limit; for so far from the plaintiff's having proved any damage, it was conclusively shown that he could not have suffered any; and on the contrary, the defendant was the real loser.**

In an action brought under the statute of Marlbridge (52 Hen. III, c. 4) for excessive distress, the plaintiff was held entitled to nominal damages, although he proved no actual damage.(a)

* Thus, also, it has been held by the English Common Pleas, in an action on the case for deceit against the secretary of an insurance company for false representations as to the management and affairs of the company, whereby the plaintiff was induced to effect an insurance

[1] Blofeld *v.* Payne, 4 B. & A. 410.

[2] Taylor *v.* Henniker, 12 A. & E. 488, which overruled the cases of Avenell *v.* Croker, Moo. & M. 172, and Wilkinson *v.* Terry, 1 M. & Rob. 377. See also, Butts *v.* Edwards, 2 Denio 164, where it is said that in case for illegal distress, if no actual damage is sustained, the plaintiff could at most but recover nominal damages.

(a) Chandler *v.* Doulton, 3 H. & C. 553.

with them, though it did not appear that he had sustained any positive loss, that he was entitled to nominal damages.[1]

The principle has been applied to the diversion of watercourses. It has been long held that the riparian proprietor of a stream has a right to the use of its waters, but it has been doubted whether he could recover in an action for its diversion without showing actual damage. It is now, however, well settled, in favor of the right; and if the infringement be established, nominal damages, at least, will in all cases be given.[2]

So where a reversioner brought trover against his tenant for cutting some branches off the trees growing on the demised close, it was held that the plaintiff was entitled to nominal damages, though no proof of the value was given at the trial.[3] **

§ 101. American cases.—* The general rule has been recognized by the Supreme Court of New York, in relation to personal actions as well as those affecting real property. In an action of trespass,[4] Bronson, J., said: "If the plaintiff succeeded in showing an unlawful entry upon his land, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for *nominal damages* at the least. It was not necessary for him to prove a *sum*, or that any particular amount of damages had been sustained. Every unauthorized entry upon the land of another is a tres-

[1] Pontifex *v.* Bignold, 3 Scott N. R. 390. The text contains the substance of the marginal note, but it should be noticed that the question came up on demurrer to the plea, that the declaration alleged that the policy was of less value to the plaintiff than if the representations complained of had been true, and that Tindal, C. J., said: "This case ranges itself within Pasley *v.* Freeman, 3 T. R. 51, and Haycraft *v.* Creasy, 2 East 92, and that class of cases, where it was held that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby *the plaintiff receives damage*, is the ground of an action upon the case in the nature of a deceit."

[2] Bower *v.* Hill, 1 Bing. N. C 549; Northam *v.* Hurley, 1 E. & B. 665; Embrey *v.* Owen, 6 Ex. 353.

[3] Cotterill *v.* Hobby, 4 B. & C. 465.

[4] Dixon *v.* Clow, 24 Wend. 188.

pass, and whether the owner suffer much or little, he is entitled to a verdict for some damages."[1] **

Even if the result of the trespass benefits the plaintiff instead of damnifying him, he is entitled to nominal damages.([a]) The obstruction of a highway gives a right of action to one thereby prevented from passing, against the person who erected the obstruction.([b]) So, also, nominal damages may be recovered by a riparian proprietor for a bare infringement of his rights.([c]) So in case of unlawful flowage of lands, nominal damages at least will be given.([d])

* So in an action of trespass for false imprisonment.[2] The plea containing an allegation that the trespass consisted in arresting the plaintiff on an execution on a judgment in trover, it was replied that the plaintiff had obtained his discharge from imprisonment, and that the defendant had notice of the discharge, to which a demurrer was put in; the court said, "Want of notice may indeed depress the damages to a mere nominal sum, but is never allowed absolutely to excuse a trespass"; and there was judgment for the plaintiff.

In a case where fraud was charged, the same court was equally explicit. They said: "Actual damage is not

[1] The same point has been ruled elsewhere: White *v.* Griffin, 4 Jones L. 139; Carter *v.* Wallace, 2 Tex. 206.

[2] Deyo *v.* Van Valkenburgh, 5 Hill, 242.

([a]) Jewett *v.* Whitney, 43 Me. 242; Jones *v.* Hannovan, 55 Mo. 462; Murphy *v.* Fond du Lac, 23 Wis. 365.

([b]) Brown *v.* Watson, 47 Me. 161.

([c]) Ulbricht *v.* Eufaula Water Co., 86 Ala. 587; Lund *v.* New Bedford, 121 Mass. 286; Tillotson *v.* Smith, 32 N. H. 90; Shannon *v.* Burr, 1 Hilt. 39; Champion *v.* Vincent, 20 Tex. 811; Mitchell *v.* Barry, 26 Up. Can. Q. B. 416 But in some States it has been laid down that actual material damage must be shown: Cory *v.* Silcox, 6 Ind. 39; M'Elroy *v.* Goble, 6 Oh. St. 187.

([d]) Chapman *v.* Copeland, 55 Miss 476; Gerrish *v.* New Market Manuf. Co., 30 N. H. 478; Amoskeag Manuf. Co. *v.* Goodale, 46 N. H. 53.

necessary to an action. A violation of right, with a possibility of damage, forms the ground of an action. . . . . Once establish, therefore, that in all matters of pecuniary dealing, in all matters of contract, a man has a legal right to demand that his neighbor shall be honest, and the consequence follows, namely: if he be drawn into a contract by fraud, this is an injury actionable *per se*. Indeed, it would not be difficult, in all such cases, to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, or one comparatively vain; and time is money. Fraud is odious to the law; and fraud in a contract can hardly be conceived of without being attended with damage in fact."[1] **

§ 102. **In actions upon patents.**—* The general principle has been also laid down by Mr. Justice Story, in regard to patents. In an action for the infringement of a patent right by making a machine, it was argued for the defendant, that no action lay except for actual damage. "But," said Story, J., "we are of opinion that where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage; and if none other be proved, the law allows a nominal damage."([a]) **

§ 103. **In actions against public officers.**—* It has been so held in Massachusetts, in the case of a sheriff neglecting to return an execution. "The plaintiff is entitled," said Wilde, J., "to nominal damages for the officer's neglect, in not returning the execution till after the return day.

[1] Allaire *v.* Whitney, 1 Hill 484. See Whitney *v.* Allaire, 4 Denio 554.

([a]) Whittemore *v.* Cutter, 1 Gall. 429, 478; *acc.* Marsh *v.* Billings, 7 Cush. 322; Davis *v.* Kendall, 2 R. I. 566.

No actual damages are proved, but where there is a neglect of duty, the law presumes damages."[1]

So where the sheriff does not return a *fi. fa.* after being notified to do so, if the plaintiff has intermeddled with the execution of the writ so as to defeat its operation, he is still entitled to nominal damages.[2]

So in an action for breach of duty in the compromise by an attorney of a suit contrary to his client's express directions, although the compromise was a reasonable one and made in good faith, and there was no positive damage.(a)

We shall have occasion to consider this branch of the subject more at large when treating of damages in suits against sheriffs and other public officers.[3]

In Vermont, an able effort was made to limit nominal damages strictly to cases where some damage is the probable result of the defendant's act, or where the act would be evidence afterwards in favor of the wrong-doer, or where a right is wantonly invaded for the purpose of injury; and it was said, "that no case can be found where damages have been given for a trespass to personal property, when no unlawful intent or disturbance of a right or possession is shown, and where not only all *probable* but all *possible* damage is expressly disproved."[4] ** But in a later case in the same State, it is held that if, during the pendency of an action against an officer for not keeping property attached so that the

[1] Laflin *v.* Willard, 16 Pick. 64; Goodnow *v.* Willard, 5 Met. 517; Lawrence *v.* Rice, 12 Met. 535.

[2] Mickles *v.* Hart, 1 Den. 548; but in England there can be no recovery without actual damage. Stimson *v.* Farnham, L. R. 7 Q. B. 175; and *acc.* State *v.* Case, 77 Mo. 247.

[3] *Post*, ch. xvii.

[4] Paul *v.* Slason, 22 Vt. 231, per Poland, J.

(a) Fray *v.* Voules, 1 E. & E. 839; *acc.* Wilcox *v.* Plummer, 4 Pet. 172; M'Leod *v.* Boulton, 3 Up. Can. Q. B. 84; Doan *v.* Warren, 11 Up. Can. C. P. 423.

execution could be levied on it, the execution be paid and discharged, the plaintiff may recover nominal damages and costs, if he had a good cause of action at the commencement of the action.(a) And still later it was held that the maxim, *de minimis non curat lex*, is never applied to a wrongful invasion of property from which result damages capable of estimation, however small.(b)

§ 104. **General principle in actions of tort.**—The general principle in regard to nominal damages in cases of tort seems to be this: If a trespass is committed, that is, if a right is invaded or interfered with, although without any actual damage resulting, the person to whom the right belongs may maintain an action and recover nominal damages. But where a person is directly using or confines his operations to his own property only, although the doing so may inconvenience another, there is no right of action, and no damages whatever can be recovered, so long as the damage is not appreciable.(c) The maxim, *Sic utere tuo ut alienum non lædas*, does not here apply to the extent of giving a right of action. The law, in such case, no longer distinguishes between no "appreciable damage" and no damage at all.(d)

§ 105. **Actions of contract: English cases.**—* The rule that the invasion of a right gives a claim in all cases to nominal damages, applies equally to matters of contract; and so it was held by the Court of King's Bench, in an action brought against a banker, for refusing payment

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(a) Brown *v.* Richmond, 27 Vt. 583.

(b) Fullam *v.* Stearns, 30 Vt. 443.

(c) St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642.

(d) Smith *v.* Thackerah, L. R. 1 C. P. 564.

of a check although in funds, no actual damage being sustained.[1]

But when the debt was paid, though after maturity, it was held to support a plea that it was paid in full satisfaction of debt and damage, and the plaintiff was not allowed to recover either interest or nominal damages.[2] And so, again, in assumpsit, where the defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some on the following *Sunday*, it was held that, though this was an admission that something was due, still as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix, or in her own right, or that it was a debt for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages, and a nonsuit was entered.[3] **

§ 106. **American cases.**—The same principle in regard to contracts, as well as invasions of right in general, has been recognized in this country. In an action on the common money counts,[4] the Supreme Court of New York held that if in assumpsit an issue be joined on a plea of payment, and no evidence be given at the trial by either party, the plaintiff will be entitled to a verdict, but such verdict will be for nominal damages only. When plaintiff in a suit for wages proves services, but fails to prove their value, he is entitled at least to a nominal sum.(a) Where judgment is given by the court on agreed facts, but no damages are agreed by the parties,

[1] Marzetti *v.* Williams, 1 B. & A. 415. See, also, Winterbottom *v.* Wright, 10 M. & W. 109. See, also, Rolin *v.* Steward, 14 C. B. 595, where actual damages were given—an important case.

[2] Beaumont *v.* Greathead, 2 C. B. 494.

[3] Green *v.* Davies, 4 B. & C. 235; and also Teal *v.* Auty, 2 Bro. & Bing. 99. *Sed vide contra* at *nisi prius*, Dixon *v.* Deveridge, 2 C. & P. 109.

[4] New York Dry Dock Co. *v.* M'Intosh, 5 Hill 290.

(a) Owen *v.* O'Reilly, 20 Mo. 603.

the judgment for the plaintiff will be for nominal damages only.(a)

In an action of covenant it has been held that the plea of *non est factum* admits a breach on the part of the defendant, and throws on him the onus of showing the contrary, but that such admission only entitled the plaintiff to nominal damages.[1] And it is held that in an action upon an instrument under seal, a court of law will give *nominal* damages only, where the presumption of valuable consideration is negatived by something appearing on the face of the paper.(b)

Upon a covenant to an attorney to pay him a reasonable fee for defending the defendant on a criminal charge, nothing more can be recovered than nominal damages, unless it be averred that he did defend, or special damage be shown.(c) So the omission of an administrator to settle his account with the probate court, renders him at all events liable to nominal damages.(d) So the damages in a suit on the covenant against incumbrances are merely nominal, if the plaintiff has paid nothing towards the incumbrance.[2] In such an action nominal damages may be recovered, though the incumbrances are removed before suit is brought.(e)

So in a suit growing out of an attachment, the goods having been delivered to a receiptor, and he having failed to perform his duty, it was said that if there was a good

[1] Goulding *v.* Hewitt, 2 Hill 644. [2] Tufts *v.* Adams, 8 Pick. 547.

(a) McAneany *v.* Jewett, 10 All. 151.

(b) Cox *v.* Sprigg, 6 Md. 274.

(c) Wilson *v.* Barnes, 13 B. Mon. 330.

(d) Webb *v.* Gross, 79 Me. 224; State *v.* Bishop, 24 Md. 310; Fay *v.* Haven, 3 Met. 109; McKim *v.* Bartlett, 129 Mass. 226; Probate Court *v.* Slason, 23 Vt. 306. But *contra*, that no damages at all can be recovered unless actual loss is suffered: Olmstead *v.* Brush, 27 Conn. 530.

(e) Smith *v.* Jefts, 44 N. H. 482.

cause of action, at the time of the commencement of the suit, but the right of action is lost by a neglect to take the necessary steps to preserve the attachment, nominal damages may be recovered.[1] So in an action on a bond given to procure the release of a debtor from arrest, there being no evidence of the loss sustained by the plaintiff, it was held that the execution could issue for nominal damages only.[2] In Iowa, in an action on a penal bond under the Code of that State, unless special damage is averred and proved, nominal damages only can be recovered.([a]) In an action on a covenant to transfer to the plaintiff the defendant's *title* to a slave, it was held that the measure of damages was not the value of the slave, but of the defendant's title; and that appearing to be defective, it was considered a case for nominal damages.[3] So in Louisiana, in a suit against the sureties on a sequestration bond.[4] And generally, for the technical breach of a bond unattended by actual damages, the obligee is entitled to nominal damages, and no more.([b])

§ 107. **Where no loss is inflicted damages must be nominal.** —The principles already examined concern the allowance of nominal damages where the question at issue is the right to recover. The question of nominal damages, however, is often raised by the defendant's attempt, not to defeat the action altogether, but to restrict the amount of damages recovered to a nominal sum by proving that the injury itself has not been substantial. The question involved in such cases is really one of compensation purely. If no substantial loss can be proved, the plaintiff must be

[1] Moulton *v.* Chapin, 28 Me. 505.
[2] Waldron *v.* Berry, 22 Me. 486.
[3] Whitehead *v.* Ducker, 11 Sm. & M. 98.
[4] Clarke *v.* Scott, 2 La. Ann. 907.

([a]) Linder *v.* Lake, 6 Ia. 164.
([b]) State *v.* Reinhardt, 31 Mo. 95.

restricted to nominal damages.[a] So in an action for delay in registering the transfer of shares, only nominal damages can be recovered.[b] When the plaintiff's intestate, who was killed by the defendant's negligence, remained unconscious from the time of the injury till his death, and therefore suffered no pain either physical or mental, only nominal damages could be recovered in an action for personal injury.[c] Where a recorder has negligently recorded the plaintiff's deed, unless special damage is proved, the plaintiff can recover nominal damages only.[d] By the negligence of the defendant in transmitting a message the plaintiff lost the benefit of a contract of employment, which, however, was terminable at the will of either party, without notice. It was held that only nominal damages could be recovered.[e]

In an action to recover private letters written to the intestate, in the absence of proof of their having a pecuniary value, nominal damages only can be recovered.[f]

In some cases the defendant's act, though wrongful, was of such a nature that it was in fact not calculated to cause loss to the defendant.[g] Thus the defendant, having mortgaged his life interest in certain property to secure a loan of £12,500, which was further secured by a conveyance of the reversion in fee and of a policy for £13,000, payable within three months after the death of the defendant, in case he should "leave issue male by his then present wife living at his death," covenanted that

[a] Freese *v.* Crary, 29 Ind. 524; Carl *v.* Granger Coal Co., 69 Ia. 519; Thorp *v.* Bradley, 75 Ia. 50; Bruce *v.* Pettengill, 12 N. H. 341; Hunt *v.* D'Orval, Dudley 180.

[b] Skinner *v.* London Mar. Assur. Corp., 14 Q. B. Div. 882.

[c] Tully *v.* F. R.R. Co., 134 Mass. 500.

[d] State *v.* Davis, 117 Ind. 307.

[e] Merrill *v.* W. U. Tel. Co, 78 Me. 97.

[f] Donohue *v.* Henry, 4 E. D. Smith 162.

[g] Woods *v.* Varnum, 21 Pick. 165; Chamberlain *v.* Parker, 45 N. Y. 569.

he would during his life, and so long as the £12,500 or any part thereof remained due, continue to pay the premiums on the policy. The mortgage deed also provided that the plaintiff might pay the premiums if the defendant neglected to do so, and charge such payments against the mortgaged premises, but contained no covenant on the part of the defendant to repay the premiums so paid. The defendant, after paying the premiums for a time, discontinued doing so, after there was no further possibility of issue by his then wife. The subsequent premiums were regularly debited year by year by the office to the mortgage account of the defendant, but the defendant had no notice of this course of dealing. In an action brought against the defendant on his covenant to pay the premiums, it was held, assuming the plaintiffs to have paid the premiums, they were not entitled to more than nominal damages.([a])

And where the assignee of a mortgage had paid the assignor part of the amount, and given his bond conditioned to collect the balance by foreclosure or otherwise, and pay it over, or after foreclosure sell the land by auction and pay the assignor the proceeds, deducting the amount paid and the costs and interest, and afterwards assigned the mortgage to another person, who entered on the land for the purpose of foreclosure, but subsequently instead purchased the equity of redemption and sold the land at auction within three years for $1,500, it was held that, although there was a technical breach of the bond, as the mortgage was not foreclosed, the plaintiff, in the absence of proof of actual damage from the mode of sale, was entitled to nominal damages only.([b])

So where goods were illegally attached, but were im-

([a]) Browne *v.* Price, 4 C. B. (N. S.) 598.
([b]) Pollard *v.* Porter, 3 Gray 312.

mediately replevied by the plaintiff and never taken out of his possession, only nominal damages could be recovered.(a) And where a deed given into the defendant's possession in escrow was wrongfully recorded by him, the grantor could recover only nominal damages, since the deed was not valid.(b) So where a plaintiff was imprisoned on two warrants, one legal and the other illegal, the justice issuing them could be held for no more than nominal damages.(c)

And often on the facts of a case it may appear that the defendant's act, though it would naturally cause loss, did not do so in the present instance.(d) Thus in Massachusetts, though an officer who takes a bail-bond is liable to an action for not returning it with the writ, yet if he deliver or offer to deliver it to the plaintiff in season for him to prosecute a *scire facias* against the bail, he is liable for nominal damages only.[1]

So in Connecticut, in an action of slander, for charging the plaintiff, a female, with want of chastity, the judge directed the jury "that if they should find that the plaintiff had so destroyed her character by her own lewd and dissolute conduct as to have sustained no injury from the words spoken by the defendant, they might give only nominal damages";[2] and on review this was held correct.

The plaintiff, a sheriff, attached goods of the defendant and took a delivery bond. The defendant brought an action of replevin against the sheriff, and the latter

[1] Glezen *v.* Rood, 2 Met. 490.

[2] Flint *v.* Clark, 13 Conn. 361.

(a) McLeod *v.* Sandell, 26 N. B. 526.

(b) Derry *v.* Derry, 3 P. & B. (N. B.) 621.

(c) Doherty *v.* Munson, 127 Mass. 495.

(d) Dow *v.* Humbert, 91 U. S. 294; Spafford *v.* Goodell, 3 McLean 97; Hotchkiss *v.* Whitten, 71 Me. 577; Pond *v.* Merrifield, 12 Cush. 181; Newcomb *v.* Wallace, 112 Mass. 25; Kelly *v.* Jones, 2 All. (N. B.) 465.

recovered; the defendant elected to retain the goods, and paid the value of them to the sheriff. In an action by the sheriff on the delivery bond, it was held that he could recover only nominal damages.[1] ([a])

§ 108. **Nominal damages as affecting costs.**—* The importance of the principle of nominal damages is mainly its effect upon the costs.([b]) Costs are usually made to depend on the amount recovered, according to the nature of the action. Thus in Massachusetts a plaintiff is en-

[1] The case of Hall *v.* Ross, 1 Dow. 201, presents, in a striking point of view, the difference between the Scotch and English law on the subject of nominal damages. It was a suit growing out of a lease of certain salmon-fishing stations which had been disturbed by the erection of a dock. In the Scotch court the judges (fourteen in number) were equally divided. Of the seven who decided against the claim, four were satisfied that the appellant had sustained damage, but apparently thought the damage could not be ascertained; and judgment was given against the party claiming, with costs. The Lord President, however, said that in several actions usual in Scotland they were under the necessity of "conjecturing the damages."

On appeal to the House of Lords, Lord Eldon said: "If, in England, a majority of the judges had been of opinion that some damages were due, their Lordships would never have heard of the decision being against the person who had made out his claim to damages. Too much might be given him, or too little; but he could never, under such circumstances, be dismissed out of court, with the additional loss of having to pay the expenses of the suit. It might be very often difficult to ascertain the amount of the damage; and in this country there were two modes of proceeding in such cases, viz.: to prove the amount by the testimony of competent witnesses; or, where there was no ground or criterion to estimate the damage, they were in the habit of giving nominal damages; but they never dismissed the claim altogether when it appeared that there was some damage." And the judgment was reversed, with instructions: *First*, that, if damages had been sustained, compensation was due. *Second*, that the party should furnish further proof; and if not, that the court should ascertain the amount of damages by such other means as their practice should authorize, and then to do what was fit and just.

([a]) Stuart *v.* Trotter, 75 Ia. 96.

([b]) In admiralty, where costs are discretionary, the right to nominal damages seems to be regarded as less important than in the common-law courts. Thus, in Barnett *v.* Luther (1 Curtis' C. C. 434), Curtis, J., said: "If it were admitted that in an action at law a seaman could recover nominal damages for a blow inflicted by the master, it does not follow that the Admiralty will award him nominal damages. . . . . At the common law, the prevailing party having a legal right to costs, which is of itself a substantial right, it is necessary to decide claims to nominal damages upon strict legal principles, even where nothing but a question of costs is involved. But in the Admiralty the costs are in the discretion of the court."

titled to full costs in personal actions, in which the title to real estate may be concerned, if he recover any sum less than twenty dollars.[1] The practical results of the principle, therefore, can only be understood by a careful analysis of the statutes of costs, of the details of which, being matters of local legislation, this work cannot properly treat.

Where the action is brought to prevent trespasses, to try titles to land, or to determine rights of any kind, it is very equitable that the party in the wrong should bear the expense of the controversy; but in most other cases the rule of nominal damages, provided they carry costs, only tends to engender litigation.(a) We shall have occasion hereafter to notice this more particularly; but it should be borne in mind that the rule of nominal damages, unless carefully limited to cases where a right is necessarily litigated, results in gross injustice. It is of no consequence whether a claim to real or to personal property is in question; the defendant ought not to be charged with the costs of the proceeding if the suit be either malicious or unnecessary. The law should hold out no inducement to useless or vindictive litigation.[2] **

§ 109. **Error in the disallowance of nominal damages.**— A motion for a nonsuit should be denied where the

[1] Pub. Stats. of Mass., ch. 198, §§ 5, 6; Ryder *v.* Hathaway, 2 Met. 96.

[2] This language is cited with approbation in Vermont, in Paul *v.* Slason, 22 Verm. 231, per Poland, J.

(a) It is provided by statute in England, and generally in the different States of the Union, that in actions at law for the recovery of money, a recovery to a certain amount beyond nominal damages shall be necessary to carry costs. Where a jury, acting on the information of the plaintiff's counsel in his summing up, that a verdict for less than £5 would not carry costs, found that amount for a trifling assault, the court granted a new trial. Poole *v.* Whitcomb, 12 C. B. (N. S.) 770.

plaintiff is entitled to nominal damages.[a] But a new trial will not be granted to the plaintiff where, upon the whole case presented, it appears that he is entitled to nominal damages only,[b] unless the recovery of nominal damages would have carried costs,[c] or unless the allowance of nominal damages is necessary for the protection of the plaintiff's interest in property.[d] But if the jury finds substantial damages when only nominal damages should have been found, the court cannot give judgment for the defendant *non obstante veredicto*, but must award a new trial.[e] Where nominal damages should be given on the facts as found, but the jury neglected to find any damages, the court may amend the record by awarding a nominal sum as damages.[f]

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[a] Hancock *v.* Hubbell, 71 Cal. 537; Quin *v.* Moore, 15 N. Y. 432.

[b] New Orleans. M. & T. R.R. Co. *v.* South. & Atl. Tel. Co., 53 Ala. 211; Bustamente *v.* Stewart, 55 Cal. 115; McAllister *v.* Clement, 75 Cal. 182; Ely *v.* Parsons, 55 Conn. 83; Jennings *v.* Loring, 5 Ind. 250; Hill *v.* Forkner, 76 Ind. 115; Platter *v.* Seymour, 86 Ind. 323; McIntosh *v.* Lee, 57 Ia. 356; Thorp *v.* Bradley, 75 Ia. 50; Faulkner *v.* Closter, 79 Ia. 15; Robertson *v.* Gentry, 2 Bibb 542; Hickey *v.* Baird, 9 Mich. 32; Haven *v.* Beidler Mfg. Co., 40 Mich. 286; Harris *v.* Kerr, 37 Minn. 537; French *v.* Ramge, 2 Neb. 254; Brantingham *v.* Fay, 1 Johns. Cas. 255; Chambers *v.* Frazier, 29 Oh. St. 362; Watson *v.* Hamilton, 6 Rich. L. 75; Hibbard *v.* W. U. Tel. Co., 33 Wis. 558; Middleton *v.* Jerdee, 73 Wis. 39; Benson *v.* Waukesha, 74 Wis. 31; Beatty *v.* Oille, 12 Can. 706. But a new trial was granted for failure to give nominal damages, though without argument of the point, in Woods *v.* Varnum, 21 Pick. 165; Brown *v.* Emerson, 18 Mo. 103. There is an analogous rule, viz.: that trifling damages found on insufficient evidence are not ground for a new trial. Maher *v.* Winona & St. P. R.R. Co., 31 Minn. 401.

[c] French *v.* Ramge, 2 Neb. 254; Chambers *v.* Frazier, 29 Oh. St. 362; Seat *v.* Moreland, 7 Humph. 575; Middleton *v.* Jerdee, 73 Wis. 39.

[d] Ely *v.* Parsons, 55 Conn. 83; Beatty *v.* Oille, 12 Can. 706.

[e] Carl *v.* Granger Coal Co., 69 Ia. 519.

[f] Regina *v.* Fall, 1 Q. B. 636; Segelke *v.* Finan, 48 Hun 310.

CHAPTER IV.

CONSEQUENTIAL DAMAGES.

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168. Notice of special use for funds
169. Notice of special use for information.

§ 110. Not all results of a wrongful act are compensated. —Having in the last chapter stated the measure of damages in cases where nominal damages only are given, we now proceed to consider the general rule which fixes the limit of compensation in cases where compensation is allowed. * That rule is the one which prohibits any allowance for damages remotely resulting from the principal illegal act. Such damages are frequently termed *remote damages*, and sometimes *consequential damages*. These terms are not, however, necessarily synonymous, or to be indifferently used. All remote damages are consequential; but all consequential damages are by no means remote.

We shall have frequent occasion to notice the existence of this principle hereafter, when examining more minutely the rules of damages in particular cases; but it

is proper, before entering on that part of our subject, to have an idea of the general boundaries of this branch of our jurisprudence.**

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§ 111. **Direct and indirect results of a wrong.**—A wrongful act may be followed directly and immediately by certain consequences; and from these may result, more indirectly, other consequences. For instance, an assault and battery may directly result in pain and bruises, and in the aggravation of a pre-existing disease. These are direct results of the battery. It may also result in loss of time, expense of medical attendance, and loss of a business situation. These are, perhaps, direct results of illness caused by the battery, but they are indirect results of the battery itself. A loss which is the immediate result of the wrong is called a direct loss; one that is an indirect result of the wrong is called a consequential loss. Again, a consequential loss may be one step or a dozen in the line of causation from the wrong. If it is sufficiently near the wrong for the law to concern itself with the connection, it is called a proximate loss; if not sufficiently near, it is called a remote loss; both proximate and remote losses being consequential. Still further, a result may be the consequence that might naturally have been expected to follow from the wrong, or it may be quite unexpected. Consequences of the expected sort are called natural consequences. It should be observed that the term consequential is often erroneously used as if it were the equivalent of remote. It has been urged with much force by Grove, J., in Smith *v.* Green,[a] that a more correct term would be *normal* consequences. Every consequence in the order of nature must in one sense be natural. But a perfectly natural consequence may be at the same time such as is not

(a) 1 C. P. D. 92.

in § 201. 202 the term Direct used synonymously with proximate.

generally expected to flow from the act in the normal or usual order. But the term *natural* consequence is, perhaps, too well fixed to be now changed.

§ 112. **Direct consequence always compensated.**—The direct consequence of a wrongful act is always a subject for compensation, whether it is or is not a natural (*i. e.*, normal,) consequence.([a]) post § 147

So where the result of an assault was the closing up of the plaintiff's tear-passages, thus weakening his eyes, he was allowed compensation for it.([b]) And where an assault rendered the plaintiff subject to fits, he was allowed compensation for the injury.([c])

So where the defendant drove against the plaintiff's carriage, and by the shock the plaintiff's friend was thrown off the seat on to the dashing-board, and the dashing-board falling on the horse, he kicked and broke it; it was held that all the damage so sustained was recoverable in trespass.[1]

In Eten *v.* Luyster,([d]) an action for dispossessing the plaintiff under a New York statute ("Summary Proceedings Act"), where the proceedings were set aside on appeal as unauthorized by the act, it was held that the plaintiff could recover for the destruction of a building, the loss of his chattels and of his money, and the value of his unexpired term, even though the money was kept in an unusual place, and the defendants probably did not suspect its presence, Allen, J., saying: "The loss of the money, although the defendants may not have suspected its presence, was the direct and necessary consequence of the acts of the defendants."

[1] Gilbertson *v.* Richardson, 5 C. B. 502.

([a]) Bowas *v.* Pioneer Tow Line, 2 Sawy. 21.
([b]) Blake *v.* Lord, 16 Gray 387.
([c]) Sloan *v.* Edwards, 61 Md. 89.
([d]) 60 N. Y. 252.

The defendant negligently ran against a pier on which the plaintiff was working, though he had not been seen by the defendant. The jar knocked out a brace between two piles, and the piles, coming together, caught the plaintiff and he was injured. It was held that the plaintiff could recover.([a])

A common case of directly ensuing loss is where a physical injury stimulates a pre-existing tendency to disease ([b]) or leads to peculiarly unfortunate results owing to a prior injury ([c]) or to a delicate state of health,([d]) or peculiar physical condition such as pregnancy.([e]) In all these cases the loss is the direct though unexpected consequence of the injury, and the plaintiff may recover compensation for it.([f])

So in an action for personal injuries, alleged to have

([a]) Hill *v.* Winsor, 118 Mass. 251. This was a case involving the right of action, and so cannot properly be cited as an authority on the measure of damages; but it affords a striking illustration of a direct but entirely unexpected consequence of a wrongful act.

([b]) Terre Haute & I. R.R. Co. *v.* Buck, 96 Ind. 346; Louisville N. A. & C. Ry. Co. *v.* Jones, 108 Ind. 551; Ohio & M. R.R. Co. *v.* Hecht, 115 Ind. 443; Lapleine *v.* R. R. & S. Co., 40 La. Ann. 661; Baltimore C. P. Ry. Co. *v.* Kemp, 61 Md. 74; Baltimore & L. T. Co. *v.* Cassell, 66 Md. 419; Elliott *v.* Van Buren, 33 Mich. 49; Jewell *v.* Grand Trunk Ry. Co., 55 N. H. 84; Stewart *v.* Ripon, 38 Wis. 584; Macnamara *v.* Clintonville, 62 Wis. 207.

([c]) Coleman *v.* New York & N. H. R.R. Co., 106 Mass. 160 (hernia); Allison *v.* Chicago & N. W. Ry. Co., 42 Ia. 274; Driess *v.* Frederich, 73 Tex. 460 (limb previously broken).

([d]) East T. V. & G. R.R. Co. *v.* Lockhart, 79 Ala. 315; Tice *v.* Munn, 94 N. Y. 621.

([e]) Campbell *v.* Pullman P. C. Co., 42 Fed. Rep. 484; Barbee *v.* Reese, 60 Miss. 906; Oliver *v.* La Valle, 36 Wis. 592; Brown *v.* Chicago, M. & St. P. Ry. Co., 54 Wis. 342.

([f]) In Pullman P. C. Co. *v.* Barker, 4 Col. 344, the Supreme Court of Colorado refused to allow such damages where they resulted from the peculiar physical condition of the plaintiff. The case is opposed to all the other authorities, and has been often criticised.

been received by the negligence of others, an instruction, in effect, that, "If you find from the evidence that the plaintiff received the injuries complained of, or any of them, in the manner alleged, and that at the time of the reception of said injuries, or any of them, the plaintiff was predisposed to malarial, scrofulous, or rheumatic tendencies, but otherwise in good health, and you further find that said injuries, or any of them, solely excited or developed said predisposition to malarial, scrofulous, or rheumatic tendencies, so that thereby, without the fault of plaintiff, her present condition, whatever you may find that to be, has directly resulted, then I instruct you that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be," correctly states the law.[a]

In cases of breach of contract direct consequences are generally natural. In some cases, however, principally contracts of carriage, the direct consequence of the breach is unexpected; but compensation for it is allowed. So where a package of jewels was sent by a carrier, no notice being given of the contents, the carrier having lost the package was required to make compensation for the jewels, though the loss of jewels was an unexpected consequence of the loss of the package.[b] And where a carrier lost a package containing plans from which it was intended to build a house the owner was allowed to recover the cost of obtaining new plans, though the carrier did not know the contents of the package.[c] And generally, when the value of the goods is enhanced by special circumstances not known to the carrier, such en-

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[a] Louisville, N. A. & C. Ry. Co. *v.* Falvey, 104 Ind. 409.

[b] Little *v.* Boston & M. R.R. Co., 66 Me. 239.

[c] Mather *v.* American E. Co., 138 Mass. 55.

hanced value may be recovered.[a] In an action for breach of contract to indemnify the plaintiff for an injury caused by surrounding his canal boat (containing potatoes) with manure, he can recover for rottenness which was caused to the boat by the manure, the measure of damages being the excess of rottenness of the boat over what would have been produced if the manure had not been used.[b]

Proximate and Remote Loss.

§ 113. **Remote consequences not compensated.**—It has already been stated[c] that the law does not and cannot give complete compensation for the injury sustained; it refuses to take into consideration any damages remotely resulting from the act complained of.

In the language of the Supreme Court of Pennsylvania, to visit upon the defendant *all* the consequences of his wrongful act "would set society on edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses, and the law therefore aims at a just discrimination, which will impose upon the party causing them, the proportion of them that a proper view of his acts and the attending circumstances would dictate."[d]

And as the Supreme Court of Massachusetts expresses it, "A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be a serious hindrance to the operations of commerce, and to the transaction of

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[a] France *v.* Gaudet, L. R. 6 Q. B. 199; Wilson *v.* Lancashire & Y. Ry. Co., 9 C. B. N. S. 632.

[b] Starbird *v.* Barrows, 62 N. Y. 615.

[c] § 38.

[d] Agnew, J., in Fleming *v.* Beck, 48 Pa. St. 309, 313.

the common business of life. The effect would be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to the compensation paid and received therefor." (a)

§ 114. **Right of action—Proximate cause.**—An analogous question to the one we are now considering arises in cases of tort, where the defendant attempts to show that the entire injury is too remote a result of his act fairly to be attributed to it. It is evident that much the same considerations are involved, whether the attempt is to show that the injury itself is remote from the act, or only certain consequences of the injury. But the former question concerns the right to bring an action, and is therefore not involved in a discussion of the measure of damages.

These classes of cases are, however, often difficult to distinguish in practice; and both are to some extent involved in the consideration of nominal damages, where they shade into one another. Besides this, a case turning upon the right of action may frequently be a precedent for the decision of a case involving the measure of damages. It is impossible, therefore, entirely to exclude from this treatise cases involving the right of action, or, as it is frequently called, proximate cause. The doctrine is founded, or at least found its first expression, in the maxim, *Causa proxima, non remota, spectatur;* or, in the language of Lord Bacon, "It were infinite for the law to judge the causes of causes, and their impulsion one on another. Therefore, it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." [1]

[1] Maxims of the Law, Regula 1.

(a) Bigelow, C. J., in Squire *v.* Western U. T. Co., 98 Mass. 232, 237.

§ 115. **Scott v. Shepherd.**—The discussion of the question of proximate cause is chiefly founded on the famous squib case.[1] In that case it appeared that the defendant threw a lighted squib into the market-house, which fell on the stall of a ginger-bread seller; he, to save himself, threw it on another stall; the proprietor of the second stall also threw it off, and in so doing struck the plaintiff and put out his eye. The judges differed in opinion.

Nares, J., held that trespass would lie because the natural and probable consequence of the defendant's act was injury to somebody, and therefore the act was unlawful; and being unlawful, the defendant was answerable for its consequences, whether the injury were *mediate* or *immediate*. In this opinion Gould, J., concurred, expressing further the opinion that trespass would lie for the mischievous consequences of another's act, whether lawful or not. Blackstone, J., dissenting, held that the injury being *consequential* only and *not immediate*, the action could not be maintained, but that case should have been brought. De Grey, C. J., held that the injury was the direct and immediate result of the act of the defendant, and that trespass would lie.

Later cases have followed this decision, on the ground that the acts of the others were involuntary; that the injury to the plaintiff was, therefore, the immediate result of the defendant's acts, as if the squib had struck against boards, and rebounded instead of having been thrown.

§ 116. **Question of remoteness a question of fact.**—The question whether an item of loss is or is not a proximate consequence of the wrong is in each case a question of fact. Only general principles can be laid down, and in applying them much latitude must necessarily be left to

[1] Scott *v.* Shepherd, 2 W. Bl. 892.

the court and jury. The difficulty is increased by the fact that the distinction between the question of proximate or remote consequences and the question of natural consequences has been so frequently lost sight of; on the other hand, the matter has been further confused with questions of certainty or uncertainty of loss. The line between proximate and natural consequences is in fact a vague one, and an item of damage might often be disallowed either as a remote or as an unexpected consequence of the wrongful act. But the subject will be clearer upon considering remote and unexpected losses separately, and much will be gained by a classification of the cases, so far as that is possible.

§ 117. **Remote consequences in the civil law.**—Before proceeding to a discussion of the principles governing consequential damages in our law, it may be profitable briefly to examine the rules of the Civil Law governing the subject. Here, too, as will be seen, writers have not clearly distinguished remote from unnatural consequences.

* The general principle denying compensation for remote consequences pervades the civil as well as the common law, and applies equally to cases of breach of contract, and of violation of duty; to all cases, in short, where no complaint is made of any deliberate intention to injure. In these latter cases we have seen that our law does not pause at the line of mere compensation, but proceeds to punish the offender. The language, however, held on this subject, and the reasons assigned for the disregard of remote damages, are far from being uniform. In regard to contracts, it is sometimes said that the defendant shall be held liable for those damages only which both parties may be fairly supposed to have contemplated at the time they entered into the agree-

ment, as likely to result from it; and this appears to be the rule adopted by the writers of the modern civil law. Thus Pothier[1] puts the case of an agreement for the sale of a horse, and failure to deliver. If in this instance horses have risen in price, the purchaser has a claim for what he has been obliged to give for a similar animal, over and above the price at which he was to have that of the seller; and this, in the language of the Roman Law, he terms the damages *propter rem ipsam non habitam.* But, on the other hand, if the purchaser were a canon of the church, and by reason of the non-delivery of the horse could not arrive at his residence in season to receive his *gros fruits* (or tithes), the seller is not liable for the loss of those *gros fruits*, because this accident was not foreseen at the time of the contract.

So, in case of a letting of a house for a given term, say eighteen years, which the lessor in good faith supposes his, and if at the end of ten or twelve years the lessee is evicted by the true owner, the lessor is liable for the damages resulting from the expense of moving, and the rise of the rent of similar tenements; these are *propter rem ipsam non habitam.* But he is not liable for an injury done to a business established in the house by the lessee subsequent to the letting, nor for furniture injured in the removal; this is damage that could not have been contemplated at the time of the contract. But if, on the other hand, the horse above referred to had been sold for the express object of enabling the canon to arrive in time for his *gros fruits*, or the building had been let for the express object of carrying on a particular business, then the injuries, which otherwise would be too remote, become direct and immediate, and constitute a valid claim, as forming part of the contract between the par-

[1] Traité des Obligations, part i, ch. ii, art. iii, § 160 *et seq.*

ties. So if one, not a carpenter, sell timber which the purchaser uses to prop up his building, and by reason of the timber being defective, the building fall and be destroyed,—if the seller acted in good faith, and was ignorant of the defect, he will only be liable for the difference in price between good timber and that sold. If, however, the seller was a carpenter who sold the timber for the express purpose of propping up the house, then he shall be held liable for all damage done the building. But again, if the timber be sold to be used in reference to a particular building, and it be used for one larger and more valuable,—even if it were insufficient for a smaller one, the seller shall be liable only for the value of the smaller building. So, again, in the second case, the seller of the timber is only liable for the building itself, and not for furniture in it at the time of its destruction. But if an architect contract to erect a dwelling-house, and by reason of his negligence it fall, he shall be liable for the furniture as well as the building, because it is to be considered that the architect must have been aware that the house would be used for holding furniture. But he is not liable for jewelry and manuscripts of great and extraordinary value.

In cases of fraud, the civil law made a broad distinction. In such cases the debtor was liable for all the consequences of his fraud, not only of those *propter rem ipsam*, but all others; for he who commits a fraud is bound, *velit nolit*, to repair the wrong caused thereby. For instance, if a cow tainted with an infectious malady is fraudulently sold, the seller will be liable, not only for the animal itself, but for the others destroyed by the spread of the contagion. But Pothier is of opinion that there is still a limit to this liability; and he puts the case of a similar contagious disease, and supposes that in con-

sequence thereof the purchaser is prevented from cultivating his lands, by means whereof his payments are suspended, his property is seized, and he is thrown into prison; he considers it clear in this case, that the seizure of property is not to be charged to the fraudulent sale, —doubts, also, if the being prevented from cultivating the property should enter into the consideration as damages, and thinks, at all events, it should only do so in part.

§ 118. **French law.**—The modern French law, as declared in the Code Napoleon, contains the recognition of the same general principles. "The damages due the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained."

"The debtor is liable only for the damages foreseen, or which might have been foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated."

"Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages comprise only so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately result from the non-performance of the contract."[1]

§ 119. **Difference between civil and common law.**—Two

[1] The language of the Code is as follows: Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite, et du gain dont il a été privé, sauf les exceptions, et modifications ci-après.

Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrât, lors que ce n'est point par son dol que l'obligation n'est point exécutée.

Dans les cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier, et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention.—*Code Civil*, liv. iii, tit. iii, sec. 1149, 1150, 1151.

prominent points of difference will be borne in mind, between the principles of the modern civil system as thus laid down, and those of the common law, which arise mainly from the arbitrary character of the forms of action as they originally existed at common law. By those forms of action, contracts and wrongs are intended to be kept wholly distinct. In case of a breach of contract (with the single exception of promises to marry), the animus or intention of the party in default, as a general rule, is entirely immaterial, and whether the non-performance of the agreement result from inability or deliberate malice, the rule of damages is the same. On the other hand, in cases of fraud or vexation, as has been already repeatedly said, compensation is blended with punishment, and the jury left largely to their discretion.

It will be perceived that the above provisions of the French Code recognize the same principles as those which we have illustrated by the extracts from Pothier, and which are, in fact, nothing else as to the leading principle, than a repetition of the general language of the Roman law: *quantum mea interfuit, id est, quantum mihi abest quantumque lucrari potui.*[1] It is difficult, however, to understand practically what rules the civil or the French law intends to lay down; as they are subject to the arbitrary discretion already often noticed. A very able commentator on the Code, holds this language:

"There is nothing more abstract than the subject of damages; the law, therefore, has only been able to lay down general principles, leaving the wisdom of the tribunals to apply them according to the circumstances and

[1] L. 13, ff. *ratem rem hab.;* and see *supra*, p. 24.

the facts of the case; and though it establishes that, in general, damages consist of the loss which the creditor has suffered, and the profit of which he has been deprived, nevertheless the judge should be more moderate in granting large damages for profits prevented than for loss actually sustained; the *lucrum cessans* is generally less calculated to excite the solicitude of the judge than the *damnum emergens;* and too much rigor on this branch of the subject would degenerate into injustice. *Summum jus summa injuria.* Such is the general opinion of our authors." [1]

Another very eminent commentator on the Code, in order to illustrate the general principle in regard to remoteness of damage, puts the case of a contract by which Titius is to let a sufficient number of vehicles on a given day, for the vintage of a certain vineyard remote from my domicil, and whither I have proceeded to prepare for the work, and hired my hands. Titius failing to furnish the vehicles, I am compelled to dismiss my hands and postpone the vintage. A day or two after a hailstorm takes place and destroys the whole crop which I have sold to pay my creditors; owing to their not being paid, my property is seized and I am driven into bankruptcy. The question is then asked, What does Titius owe; does he owe me the value of my crop in whole or in part? Should he indemnify me for the loss of my property and my consequent insolvency? And the learned writer de-

[1] Il n'est pas de matière plus abstraite que celle relative aux dommages-intérêts; aussi la loi n'a t'elle pu tracer que des principes généraux en s'en remettant à la sagesse des tribunaux pour leur application selon les circonstances et les faites de la cause. Et quoiqu'elle établisse que les dommages-intérêts sont en général la perte que le créancier a éprouvée et le gain dont il a été privé, néanmoins le juge doit être plus éservé à en accorder de considérables pour le gain manqué qué pour la perte réellementé prouvée: *lucrum cessans* est généralement moins susceptible d'exciter sa solicitude que le *damnum emergens.* Et c'est en cette matière que trop de rigeur dégénérerait souvent en injustice. *Summum jus summa injuria.* Tel est le sentiment commun des auteurs— Duranton, *Cours de Troit Français*, vol. x. n, 480 and 481.

cides as to the latter head of damage, that Titius is not responsible. He pronounces it too remote a loss. It is the direct and immediate result of the bad state of my pecuniary affairs, which Titius had no means to foresee, and which he was not bound to consider. As to the loss of the crop, he proceeds to distinguish between bad faith (*dol, mauvaise foi*) and inability. If the failure to perform the contract was owing to the latter, then, though Titius is in fault, still, as it is not in consequence of his bad faith that the contract has been broken, he is, by the provisions of the Code above cited, liable only for the damages which were foreseen, or which might have been foreseen at the time ; and it could not be anticipated that the day after that fixed upon, a hailstorm would destroy my crop. But on the contrary, if the non-performance was owing to bad faith, then the same author considers Titius liable for the loss of the crop, because it cannot reasonably be denied that this loss is an immediate and direct result of the non-performance of the contract. If it be said that the immediate and direct *cause* of the loss of my crop was the storm, and not the fault of Titius, the answer is, that to render the debtor acting in bad faith responsible for damages, the Code (Art. 1151) does not require that the non-performance of the contract should be the *immediate and direct cause* of the damage, but only that the damage should be the *immediate and direct result* (*suite*) of its violation, which is a very different thing.[1]

This case, again, well illustrates the difference between the French system and our own in regard to damages. With us, as a general rule, no discrimination is made in regard to contracts, as to the motive which produces their

[1] Toullier, Droit Civil, liv. iii, tit. iii, ch. iii. De l'effet des Obligations, § 284 *et seq.*; vol. vi, p. 290 *et seq.*

non-performance. So in this instance, whether Titius was actuated by a fraudulent or a malicious purpose, no action could be maintained but for a breach of contract; and in that action, we apprehend that the damage resulting from an extraordinary hailstorm would be considered altogether too remote to be allowed as damages. On the other hand, however, if Titius, instead of violating an agreement, had committed a malicious trespass, as by removing the vehicles prepared for the vintage, the jury might give damages in their discretion to punish the offense.

Another case from the same commentator will illustrate the extent to which the civil law goes in quest of resulting damage. If, for instance, an architect who has contracted to build a house by a given time for a given tenant, constructs it so ill that a part of it falls down, this causes three sorts of loss,—the expense of rebuilding, the rent that the proprietor might have received, the damage done the tenant; and though the second and third class appear remote, yet, as they are caused by the act of the contractor, they should be charged to him. And there is even a fourth class of loss for which he should answer, that of the furniture in the house, and which could not be saved, for the architect must be presumed to know that the house would contain furniture; but he is not responsible for jewelry, or things of extraordinary value, unless, indeed, there was a deliberate design to injure. Toullier proceeds to say that in this case, and in many others, the damages might be so enormous as to ruin the party charged, although he was acting in entire good faith; and that hence Domat has been induced to adopt the principle that the *architects able to meet these losses* should be charged with them, but that inasmuch as contractors have not always the means to

make such complete remuneration, and as humanity should moderate the rigor of extreme justice, this kind of damages should be regulated by discretion. Toullier, however, vigorously combats what he pronounces a false and dangerous doctrine, and which, he says with extreme good sense, would result in different judgments of the same cause, according to the fortune of the debtor. The discussion is curious as going to illustrate the apparent absence of any fixed measure of damages in the French law,[1] and the caution with which its authors should be consulted on questions connected with this branch of jurisprudence.

Having thus rapidly exhibited the rules of the French and Modern Civil law as to remote and consequential damages, we turn to other systems.

§ 120. **Scotch law.**—One of the most eminent authors of the Scotch jurisprudence, divides resulting damage into *certain* and *uncertain:* certain, as the loss of rent consequent on the destruction of a house; uncertain, as the profit that might have been made upon property of which the owner has been robbed.

Certain consequential damage is, he says, always allowed by a court of law. Uncertain damage will be allowed by a court of equity, where a criminal act is the cause of the loss; and this, because the criminality throws the burden of proof on the delinquent, and he is charged with every probable item of profit, unless he can give

[1] The vagueness of the French system in this respect dates, as we have already seen, from an early period. One of the best authors of their ante-revolutionary laws says, "Nothing is more arbitrary than the amount of damages." But the whole clause is worth extracting:

Pour les dommages et intérêts, ils dependent toujours des circonstances du fait; c'est pourquoi il n'y a rien de plus arbitraire, et l'on voit très souvent des juges que les fixent à une somme si modique qu'ils ne vont pas à recompenser la dixième partie de ceux qui ont été soufferts par la partie à laquelle ils sont adjudgés; ces sortes d'indulgences ne sont pas seulement contraires au bien des particuliers, mais elles nuisent encore advantage au bien public, puisqu'elles fomentent les violences et la mauvaise foi par l'espérance d'impunité. —Argou, *Institution au Droit François*, Paris, 1787, liv. iv, ch. 17.

conclusive evidence that no profit could have been made. But we apprehend that with us no distinction exists between the rules of equity and law upon this subject.[1]

In regard to acts merely culpable and not criminal, or when fault exists without malice, the same writer declares that uncertain consequential damages cannot be allowed.[2]

So of the *pretium affectionis*, or value set upon the injured property by its owner, over and above its intrinsic or market value, he holds that it is not to be allowed unless the injury is intentional.

§ 121. **Louisiana law.**—In Louisiana the subject of damages is regulated by the Code of that State (Arts. 1933, 2315, 2316), and it is declared in reference to our present subject, "that when the object of the contract is anything but the payment of money, where the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract"; and this principle has frequently been carried out by the courts of that State.[3] So, in a case where it might be inferred to be in the contemplation of the parties to a contract that a sugar-mill and engine, which the manufacturer undertook to put up within a given time, was for the purpose of getting a certain crop, it was held that a failure to put it up in time entitled the plaintiff to recover for the loss of crop and extra wages caused by the delay.[4]

§ 122. **General principles in the common law.**—The language employed by the courts of common law to define the limits of consequential damages has not been uniform.

[1] The question whether, in awarding damages, there be any difference between a court of equity and a court of common law, is considered by Lord Kaims, book i, part i, ch. iv, § v, p. 159.

[2] Book i, part i, ch. iv, § v, p. 160.

[3] Williams *v.* Barton, 13 La. 404.

[4] Goodloe *v.* Rogers, 10 La. Ann. 631.

It has been sometimes said by the courts which follow the course of the common law, that no allowance could be made for *remote* or *consequential* loss; sometimes that the damages to be compensated must be the *proximate* and *natural* consequences of the act complained of.

"Where the action," says the Supreme Court of New York,[1] "is for the breach of a contract, and no special damages are stated in the declaration, the plaintiff is confined in his recovery to such only as naturally arise from the breach complained of; but if the damages claimed do not *naturally* arise from that fact, they cannot be recovered *unless they are particularly stated in the declaration*, and not then *if they are not proximate*. Consequential damages may naturally arise from the mere breach of the contract, but they often depend on the peculiar circumstances of the case. Such are allowed without being stated in the pleadings, as *are the fair, legal and natural result of* the breach of the defendant's agreement; if they *do not thus result*, the jury cannot allow them, unless they are stated in the declaration and established by proofs." Here it is said that damages not "*naturally*" arising from the defendant's act can be recovered, provided they be "*proximate*," and that though such damages be not the "fair, legal and natural" result of the breach of contract, still, they can be allowed for if alleged and proved.

The rule is not much more definite when it is said that the damages must be the *legal and natural* consequence of the act complained of. As in a case,[2] in which the defendant had slandered the plaintiff—who was employed by one J. O. as a journeyman for a year, at certain wages—by saying that he had cut certain flocking cord, and the

[1] Marcy, J., in Armstrong *v.* Percy, 5 Wend. 535, 538.

[2] Vicars *v.* Wilcocks, 8 East 1.

plaintiff claimed special damages for his discharge by J. O. in consequence of the slander, before the expiration of the year, it was held by Lord Ellenborough, that the discharge of the plaintiff by J. O. was a mere wrongful act, and not "the legal and natural consequence of the slander complained of."[1]

Mr. Greenleaf has said, with more accuracy:[2] "The damage to be recovered must always be the *natural and proximate* consequence of the act complained of." But it is far easier to lay down a general proposition than to apply it to a particular case. When we come to analyze causes and effects, and undertake to decide what is the natural result of a given act, and what is to be regarded as unnatural—what is proximate and what remote—we shall find ourselves involved in serious difficulty. Many things are perfectly natural, and yet very remote consequences of a particular act; many other results are proximate, nay, immediate, and yet so little to be expected that they can scarcely be pronounced natural. Nor does the requirement that the damage be both natural and proximate relieve us from the difficulty.[3] **

For the purpose of making this subject clearer: All losses, as has been seen, are either direct or consequen-

[1] In Kelly *v.* Partington, 5 B. & A. 645, an action of slander for words of ambiguous meaning, and to which no interpretation was given by innuendo, it was said, by Taunton, J., "In order to make words actionable, they must be such that special damage may be the *fair and natural result* of them"; and by Patterson, J., "I have always understood that the special damage must be the *natural* result of the thing done." Similar language is used by the Supreme Court of New York, in Crain *v.* Petrie, 6 Hill 522.

[2] Evidence, 14th ed., vol. ii, § 256.

[3] In Alabama, the phrase, "natural and proximate consequence," has been cited with approbation in a case of malicious prosecution. Donnell *v.* Jones, 13 Alabama 490. But in truth the question of the remoteness or consequentiality of damage often loses itself in the most metaphysical regions of cause and effect. The reader of Plutarch will remember the charge brought against Pericles by his son Xanthippus, who said "that Epitimius, the Pharsalian, having undesignedly killed a horse with a javelin that he threw at the public games, his father spent a whole day in disputing with Protagoras which might be properly deemed the cause of his death, the javelin, or the man that threw it, or the president of the games."

* Direct used synonymously with Proximate in post §§ 201, 202

tial; and, further, consequential losses are either proximate or remote. A direct loss must always be compensated; a remote loss, never. Between the two lies the debatable ground of proximate loss. Proximate losses are either natural or unexpected. Of these, natural losses must always be compensated; unexpected losses cannot. But the line between the two latter classes of loss is a varying one; it depends, as will be seen, not only upon the nature of the wrongful act, but also upon the expectations which the wrong-doer, as a reasonable man, could have formed as to its result. Notice to the wrong-doer of a probable consequence may render that consequence a natural one, though it might otherwise have been unexpected. Compensation may be recovered for such proximate losses as are also the natural results of the wrongful act, either in the nature of things, or in the light of special circumstances of which the wrong-doer had notice.

§ 123. **Consequences of an act complex in nature.**—Before examining the decided cases, it should be clearly comprehended that recovery of compensation for remote loss is refused, not because the wrongful act was not in one sense the cause of the loss, but because the loss is so far in causal sequence from the injury that the law cannot take it into account. It should be noticed that the effects which flow from the *cause of action* do not form a single chain, but that each effect in this chain is produced in part by one or more other causes. Every effect is the product of numerous causes, and every cause produces in its turn numerous effects. The general result is a network of causes and effects rather than a single causal chain. For example: A fails to pay his note when due to B. B, in consequence, loses the money, and becomes bankrupt. But this failure was due not only to the lack of this particular money, but to a multitude of co-oper-

ating causes, such as a stringency in the money market, which at the time made the loss irreparable. Hence we say that the only direct and proximate consequence was the loss of the money, leaving the effect of the combination of the cause of action with other causes wholly out of view. So, one effect of B's failure is domestic misery and the consequent death of his child. But in this appear the effects of additional co-operating causes, such as exposure, constitutional tendency to disease, etc. But as the law stops short at this primary effect, *a fortiori*, it must set these down as remote consequences.

§ 124. **Avoidable consequences.**—Another class of consequences, which it is necessary briefly to refer to here are those called *avoidable*. These are such consequences, as under ordinary circumstances would be recoverable, but which are nevertheless excluded from consideration on the ground that the plaintiff should, acting as a person of ordinary prudence under the circumstances, have prevented or avoided them. These will be fully considered in a subsequent chapter. It is only necessary here to point out that in many decided cases elements of avoidable damage have been excluded by the courts as *remote*. Indeed it will further appear that there is much ground for holding all avoidable consequences to be in the strict sense of the word remote, as being the result not of the cause of action, but primarily of negligence or indifference of the plaintiff. They are the result, in the view of the law, not of the cause of action, but of this combined with the influence of the plantiff's own will.

§ 125. **Instances of remote consequences.**—Every suit at law is likely to involve some novel question of remoteness of damage. So far-reaching and varied are the consequences of what seems the least important act, that

every wrong drags after it a chain of more or less disastrous consequences, which the injured party may ascribe with truth to the first wrongful act; and in every suit the plaintiff attempts to shift to the defendant the burden of as many links as possible of this chain. A few simple cases may first be stated.

The plaintiff having been induced to put money into an oil speculation by the defendant's false representations, afterwards, but before he discovered the fraud, put in more money. The loss of the latter money was a proximate consequence of the false representation, and the plaintiff could recover compensation for it.[a] Where a defective boiler, sold by the defendant to the plaintiff, exploded and injured the plaintiff's mill and machinery, the damage thus done was held not too remote for recovery.[b] Diminution of the value of the property for purposes of renting, and the hindrance to the plaintiff's servants in performing their labor, and damage resulting from water passing through a hole in the roof, caused by an explosion from a neighboring quarry, are proximate damages, and as such recoverable.[c] The damages caused to the plaintiff's crops by the defendant repeatedly pulling down his fences, is sufficiently proximate to be recovered.[d] Where the jury found that in consequence of the wrongful abduction of all the plaintiff's slaves, the cattle of the neighbors destroyed his corn, and a flood in the river swept away a quantity of his wood, it was held that it was not erroneous to include the value of these things in the damages, in an action of trespass for carrying away the slaves, nor to allow compensation for

But see post § 201

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[a] Crater *v.* Binninger, 33 N. J. L. 513.
[b] Page *v.* Ford, 12 Ind. 46; Erie C. I. W. *v.* Barber, 106 Pa. 125.
[c] Scott *v.* Bay, 3 Md. 431.
[d] Bridgers *v.* Dill, 97 N. C. 222.

corn eaten by hogs through lack of the slaves to guard it.([a]) Where the plaintiff was wrongfully expelled from a protective union, whereby he lost employment in his trade, he was allowed to recover compensation for the loss of employment.([b]) Where the plaintiff's carriage was injured by the defendant's default, and he was exposed to a storm while getting another carriage, he may recover compensation for the illness caused by the exposure.([c]) A young boy was put by force in a car and carried five miles from home; he walked back home, and illness resulted. It was held that he could recover compensation for the illness.([d])

But on the other hand, where a public bridge over a slough became impassable for want of repairs, by reason of which the plaintiff could not transport over it a quantity of wood collected for that purpose, and the wood, while awaiting transportation, was washed away by a freshet, the loss was held too remote for recovery.([e]) Where the plaintiff suffered a miscarriage through the defendant's wrong, her grief at the loss of the child is too remote to be compensated.([f]) In an action for breach of a contract to convey an undivided share of certain land, the other share of which was owned by the plaintiff, it was held that the expense of proceedings for partition of the land was too remote.([g])

([a]) McAfee *v.* Crofford, 13 How. 447. In this case and the previous one it will be noticed that the plaintiff could not avoid the consequences of the defendant's act, so that the principle referred to in the last section is not involved.

([b]) People *v.* Musical M. P. Union, 118 N. Y. 101.

([c]) Ehrgott *v.* New York, 96 N. Y. 264.

([d]) Drake *v.* Kiely, 93 Pa. 492.

([e]) Dubuque W. & C. A. *v.* Dubuque, 30 Ia. 176.

([f]) Western U. T. Co. *v.* Cooper, 71 Tex. 507; Bovee *v.* Danville, 53 Vt. 183.

([g]) Morrison *v.* Darling, 47 Vt. 67.

In a recent case in Wisconsin the plaintiff brought suit for a personal injury. It appeared that his leg had been broken by the injury and had healed, when it was again broken by an accident, which was not chargeable in any way to the plaintiff. If the leg had not been weakened by the first fracture, it would not have been broken by the accident. It was held that the second fracture was a proximate consequence of the first injury, and that his damages should include compensation for it.[a] This is an extreme case, and might well have been decided otherwise. The loss seems remote from the injury, being complicated by several intervening causes. In Lincoln *v.* Saratoga & S. R.R. Co.[b] the *probability* of such a second fracture was held too remote.

§ 126. **Intervention of independent will.**—There are many cases in which a human agency or the voluntary act of a person over whom the defendant has no control, and his act no influence, intervenes after the defendant's wrongful act. Here the consequences are generally treated as remote. Thus in an English case the defendant engaged the plaintiff as a seaman for a voyage to Peru; the vessel proved to be a privateer. At Peru the plaintiff went ashore to consult the consul, and was arrested and imprisoned by the Peruvian authorities as a deserter from the Peruvian army. It was held that this consequence of the defendant's fraud was too remote for compensation.[c] Wool imported by the plaintiff was wet by the defendant's tort, and the plaintiff was obliged to open the original packages in order to dry it. Congress afterwards allowed importers a drawback on wool in the original

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(a) Weiting *v.* Millston, 46 N. W. Rep. 879 (Wis.).
(b) 23 Wend. 425; see chap. v.
(c) Burton *v.* Pinkerton, L. R. 2 Ex. 340.

packages. It was held that the loss of this drawback was too remote a consequence of the defendant's tort to be compensated.(a) In an action under the civil damage act it appeared that the plaintiff's intestate, after being made drunk by the defendant, made an attack upon a neighbor's house and was killed. This result was held too remote for compensation.(b) In an action for malicious prosecution, it appeared that the plaintiff had suffered loss through the illness and insanity of his wife, caused by the arrest. This loss was held too remote.(c) Where the defendant agreed to pay a creditor of the plaintiff, and on his default the creditor attached the plaintiff's property and sold it at a sacrifice, it was held that the loss was too remote and the plaintiff could not recover damages for the sale.(d)

In a case in Tennessee, it appeared that the State leased convicts to the defendant, and agreed to keep a guard over them. It failed to keep the guard. The defendant's shop was burned by a fire set by one of the convicts, and in an action by the State for the hire the defendant set up his loss in recoupment. The court held that the loss was not the natural consequence of the State's breach of contract.(e) Nicholson, C. J., said: "Looking on the contract for the measure of damages for its breach, it follows inevitably that the expense of such guards as are contracted, furnishes the true measure of damages. It is conceded for the lessees that the failure to keep a night guard on watch did not cause the fire, but it enabled the incendiary to consummate his design

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(a) Stone *v.* Codman, 15 Pick. 297.
(b) Schmidt *v.* Mitchell, 84 Ill. 195.
(c) Hampton *v.* Jones, 58 Ia. 317: *acc.* Ellis *v.* Cleveland, 55 Vt. 358.
(d) Mitchell *v.* Clarke, 71 Cal. 163.
(e) State *v.* Ward, 9 Heisk. 100, 133.

of setting fire to the shop. While, therefore, it is clear that the loss was the direct and immediate consequence of the fire, it is equally clear that it was not the direct and immediate consequence of a failure to keep up a night watch. Such a loss cannot reasonably be assumed to have entered into the contemplation of the parties. The contract was that a night guard should be employed; the breach was in not having such a guard; the damage looked to in making the contract was the expense of such guard, and not the probable or possible or remote damage that might occur."

But where the act of the third party is caused entirely by the defendant's act, the consequence is not too remote. So where the plaintiff was wrongfully arrested by the defendant and delivered to the authorities, who imprisoned him, compensation for the imprisonment was allowed against the defendant.(a)

§ 127. **Loss of credit or custom.**—Loss of credit or custom generally involves the intervention of the will of strangers, and is therefore generally remote. Thus, in case of a wrongful attachment, no compensation is allowed for loss of credit;(b) and the same result was reached where the plaintiff wrongfully sued out a writ of *ne exeat*.(c) So, in Alexander *v.* Jacoby,(d) it was held that a plaintiff, whose goods had been attached, could not recover damages for their diminished market value by their

(a) Tyler *v.* Pomeroy, 8 All. 480.

(b) Lowenstein *v.* Monroe, 55 Ia. 82; Marqueze *v.* Sontheimer, 59 Miss. 430; Weeks *v.* Prescott, 53 Vt. 57. In Pollock *v.* Gannt, 69 Ala. 373, the court seems to have assumed that compensation in such a case may be recovered for loss of credit; but the point was not involved in the decision. In MacVeagh *v.* Bailey, 29 Ill. App. 606, compensation was allowed for injury to credit.

(c) Burnap *v.* Wight, 14 Ill. 301.

(d) 23 Oh.St. 358.

reputation being affected, the court saying, "The injury is too vague and uncertain, and the damage too remote." So where the defendant failed to assign to the plaintiff (according to agreement) a judgment against him, in consequence of which property of the plaintiff was seized and sold to satisfy the judgment, it was held that loss of credit arising therefrom was too remote to be compensated.(a)

In an action for delay in furnishing a cider-press, loss of custom is too remote.(b) And where the defendant negligently allowed oil to drip from his tenement above the plaintiff down on the plaintiff's goods, it was held that loss of custom to the plaintiff through the injury to his goods was too remote for compensation.(c)

But on the other hand, where the cause of action is a direct blow to the credit or trade of plaintiff, the rule is otherwise. Thus, where the defendant, agent of the plaintiff in G., broke his contract to keep a cash account of £500 to meet drafts of the plaintiff, and in consequence a draft was returned dishonored, he was held liable for the loss of trade in G., which was consequently suspended, and for loss in the general business of the plaintiff because of his impaired credit.(d) In a case at Nisi Prius,[1] Lord Kenyon held that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, so that the plaintiff lost their trade. This, though a case involving the right of action, seems an authority in point.

[1] Tarleton *v.* McGawley, Peake, N. P. 205.

(a) Gilbert *v.* Campbell, 1 Hannay 471.

(b) Dennis *v.* Stoughton, 55 Vt. 371.

(c) Stapenhorst *v.* American M. Co., 36 N. Y. Supr. Ct. 392.

(d) Boyd *v.* Fitt, 14 Ir. C. L. 43; *acc.* Larios *v.* Bonany y Gurety, L. R. 5 P. C. 346.

§ 128. **Loss caused by a crowd attracted.**—Whether a trespasser who draws a crowd after him is responsible for the injury done by it depends upon whether his act was of a nature to attract a destructive crowd. Where the defendant made a harangue in the street, and a crowd collecting to hear him broke a pile of paving stones belonging to the plaintiff, the question whether or not the loss was proximate to the defendant's act was held to depend upon whether it was to be expected to result.(a) Where the defendant went up in a balloon, which descended into the plaintiff's garden and attracted a crowd, who trod down the plaintiff's vegetables and flowers, the original wrong-doer was held answerable for the injury done by the crowd as well as by himself.[1]

A similar principle has also been applied to the construction of statutes. An action was brought in the King's Bench on the stat. 1 Geo. I, st. 2, c. 5, § 6, against the hundred for reparation in damages on account of rioters having pulled down in part the plaintiff's dwelling-house; and there was a second count for beginning to pull down an out-house. The plaintiff was a baker. It was proved that the mob compelled the plaintiff to sell a quantity of flour at a price much below its value; that they then began to break the windows of the bake-house, and of his dwelling-house. Besides this, they burst open the lock of a warehouse belonging to the plaintiff on the other side of the street, and threw some flour into the street. It was held that the damage done the warehouse was an act not consequential to the other —and that the flour which the mob compelled the

[1] Guille *v.* Swan, 19 Johns. 381.

(a) Fairbanks *v.* Kerr, 70 Pa. 86. The court said that the latter was a question for the jury. There can be no doubt, however, that the determination of all questions of remoteness lies with the court. See also § 116

plaintiff to sell was not a damage recoverable against the hundred.[1] And the same point was held in another action brought against the hundred, as to flour taken away or stolen by a mob.[2]

§ 129. **Intervening agencies—General rule.**—The foregoing cases have not led to the general statement of any explicit rule with regard to the effect of the introduction of an independent will upon the measure of damages. That such a rule might be formulated may be inferred from the fact that an analogous rule exists bearing on the right of action. In cases where the plaintiff can clearly show that the wrong defendant has suffered is the result not of the act complained of, but of a subsequent act in the chain of causation by a third person, only remotely connected with the principal action, the action fails.([a]) So, too, it might be inferred that the allowance of damages should stop, although the action itself be maintained, when it appears that further damage really flows from a similar independent cause. In cases such as some of those we have just considered the action of the intervening agents (*e. g.*, the crowd attracted) is regarded as the natural or normal result of the plaintiff's own act.

The true test would seem to be whether the action of the intervening agency was such as was to be expected to happen upon the defendant's act: if it were so to be expected, the result is not remote. In the case of a human agency, the intervention will generally be of a sort not to be expected.([b]) But where the intervention was directly and naturally induced by the defendant's act, the consequence is not remote, though the intervening agency was human.([c]) This is strikingly shown in cases

[1] Burrows *v.* Wright, 1 East 615. [2] Greasley *v.* Higginbottom, 1 East 636.

([a]) Carter *v.* Towne, 103 Mass. 507. ([b]) §§ 126, 127. ([c]) § 128.

where damages are sought for loss of credit. As has been seen, if the injury was, for instance, to the stock in trade of a merchant, loss of credit is a remote consequence; if it was a direct blow to his credit, for instance, a breach of contract to accept a draft, loss of credit is proximate.

§ 130. **Loss through a forced sale of property.**—Where through the defendant's default the plaintiff is obliged to raise money, and in order to raise it his goods are sold at a loss, this loss is too remote from the injury to be compensated.

So in New York, the plaintiff sued the defendant on a contract, by which the defendant, in consideration of $5 paid him, agreed to take a note executed by the plaintiff and a surety, payable the first of May, and to forbear prosecution of the note for nine months; and it was alleged that the defendant did not forbear, but sued on the note, by which the plaintiff lost $500. The plaintiff offered to prove, to enhance the damages, that when he was sued he was engaged in his harvest, and that for the purpose of raising money to satisfy the demand he was obliged to quit his work and thresh his grain, and that he was put to great trouble in raising the money. But on certiorari to the Supreme Court, Woodworth, J., said, "It appears to me that this could not form a ground of damage, although the plaintiff might have suffered inconvenience and loss by the failure to fulfill the contract. Such remote consequences cannot be taken into consideration in estimating the damages"; which was qualified by this remark, "Besides, there does not appear any necessity that the plaintiff, at the moment the writ was served, should quit his harvest and make sacrifices to raise the money." [1]

So in Alabama, in case for malicious prosecution,

[1] Deyo *v.* Waggoner, 19 Johns. 241; *acc.* Carland *v.* Cunningham, 37 Pa. 228.

whereby the plaintiffs were driven to an assignment, the loss in the sale of the goods made under the assignment is not a proximate or natural consequence of the malicious prosecution.([a])

So in an action for failure to accept drafts, a loss on pork which the plaintiff was obliged to sell in order to raise money was held too remote for compensation.([b])

So in Texas, where the defendant had sued the plaintiff in his absence from the State, by publication, and the plaintiff's agent, seeing the advertisement in the paper, got the defendant to promise to discontinue the suit, which he failed to do, and judgment having been obtained in it, a tract of the plaintiff's land, worth about $5,000, was sold, under an execution on the judgment, to a purchaser in good faith, without notice, for $150—it was held that if the defendant were liable for his failure to dismiss the suit, the loss of the tract of land, if a consequence at all of such failure, was too remote to make him responsible for it.([c])

The plaintiff built a railroad for the defendant. The contract price not being paid by the defendant at the proper time, the plaintiff was unable to pay his workmen, and the plaintiff's tools and carts were seized and sold for debt at a sacrifice. It was held that this loss was too remote a consequence of the breach of contract.([d])

§ 131. **Injury to animals—Infectious disease.**—Where animals sold have an infectious disease, known to the seller, but not to the purchaser, which is communicated to

([a]) Donnell *v.* Jones, 13 Ala. 490; *acc.* Fitzjohn *v.* Mackinder, 9 C. B. (N. S.) 505, 2 L. T. (N. S.) 374. And the same decision was reached where the assignment was caused by a wrongful attachment: Cochrane *v.* Quackenbush, 29 Minn. 376.

([b]) Larios *v.* Bonany y Gurety, L. R. 5 P. C. 346.

([c]) Travis *v.* Duffau, 20 Tex. 49.

([d]) Smith *v.* O'Donnell, 8 Lea 468.

other animals of the purchaser, the latter may recover compensation for the damage done to his other animals.([a]) The same rule applies where the defendant's sheep trespass on the plaintiff's land and communicate disease.([b]) And where the defendant's rams trespassed on the plaintiff's land and got his ewes with lamb out of season, so that the lambs died soon after birth, the plaintiff was allowed to recover the diminution in value of the ewes for breeding and other purposes.([c])

Where the plaintiff's horse was injured by the defendant's wrongful act, and as a result was rendered timid, unsound, and unkind, loss from this source was not too remote from the injury.([d]) So damages from the non-thriving of cattle in consequence of the construction of a railroad through their pasture were held not too remote.([e])

§ 132. **Straying animals—Non-repair of fences or gates.**—Trespass by cattle and injury to crops is a natural consequence of a defect in a fence, and damages therefor are accordingly recoverable.([f]) Through the defendant's failure to keep a fence in repair, his calf strayed into the plaintiff's premises. It was held that the plaintiff, in an action of trespass for the entry (alleged as defendant's trespass), could show, in aggravation of damages, that the calf bit off some limbs of one of the plaintiff's trees and

([a]) Mullett *v.* Mason, L. R. 1 C. P. 559; Smith *v.* Green, 1 C. P. D. 92; Knowles *v.* Nunns, 14 L. T. R. 592; Wheeler *v.* Randall, 48 Ill. 182; Sherrod *v.* Langdon, 21 Ia. 518; Joy *v.* Bitzer, 77 Ia. 73; Broquet *v.* Tripp, 36 Kas. 700; Faris *v.* Lewis, 2 B. Mon. 375; Bradley *v.* Rea, 14 All. 20; Long *v.* Clapp, 15 Neb. 417; Jeffrey *v.* Bigelow, 13 Wend. 518; Wintz *v.* Morrison, 17 Tex. 372; Routh *v.* Caron, 64 Tex. 289; Packard *v.* Slack, 32 Vt. 9.

([b]) Barnum *v.* Vandusen, 16 Conn. 200.

([c]) Stearns *v.* McGinty, 55 Hun 101.

([d]) Whiteley *v.* China, 61 Me. 199.

([e]) Baltimore & O. R.R. Co. *v.* Thompson, 10 Md. 76.

([f]) Scott *v.* Kenton, 81 Ill. 96.

broke another tree, although it was shown that this was not an injury which cattle are by nature wont to commit.(a)

Where, through the defect of a gate which the defendant was bound to repair, his horse, which was not shown to be vicious, strayed into the plaintiff's field and there kicked the plaintiff's horse, the damage was held not too remote.(b)

Where the defendant had not repaired his fence, by reason of which the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a hay-stack, the court considered that such damage was not too remote.[1]

On account of the disrepair of a fence which defendant was required to maintain, the plaintiff's cattle strayed into a field, ate branches of a yew-tree, and were thereby poisoned. The defendant was held liable for the loss of the cattle.(c)

So where the statute provided that a party neglecting to keep in repair his part of a fence should "be liable for all damages done to or suffered by the opposite party in consequence of such neglect," and in consequence of the defective condition of the defendant's fence, the plaintiff's horses escaped into the defendant's pasture, where they were gored by a vicious bull of the defendant, the damage was held not too remote, the court considering the defendant's liability very much that of a party at common law—"bound to do an act, from the omission to do which an injury results to others," and not regarding it as indispensable to the maintenance of the action that the

[1] Powell *v.* Salisbury, 2 Y. & J. 391.

(a) Keenan *v.* Cavanaugh, 44 Vt. 268.
(b) Lee *v.* Riley, 34 L. J. C. P. 212; Lyons *v.* Merrick, 105 Mass. 71.
(c) Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

vicious habits of the bull should have been known to the defendant.[a]

§ 133. **Loss through deprivation of machinery or of business premises.**—Where the plaintiff has been deprived of machinery or other means of carrying on his business, he may recover for loss of business, if such loss naturally follows. Thus, for deprivation of machinery evidently to be used in a mill, the owner may recover damages caused by the loss of use of the mill; for instance, wages paid the hands in excess of the work they were able to to do,[b] or for loss of stock on hand rendered useless for lack of the machine.[c] Where the plaintiff's vessel is injured by collision, he may recover the amount paid out to the crew in wages during the period of detention.[d] And where through repairs improperly made a sea-going steamship was detained, the owner may recover the expense of the detention.[e]

So for deprivation of premises used in business, the injured party may recover damages for the value to him of the use of the premises.[f] A railroad contractor built houses for shelter of his workmen. The defendant wrongfully took possession of the premises. The contractor was allowed to recover compensation for loss by reason of his men leaving him for lack of shelter.[g] In an action on an injunction bond, where the injunction prevented

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[a] Saxton *v.* Bacon, 31 Vt. 540.

[b] Waters *v.* Towers, 8 Ex. 401; New York & C. M. S. *v.* Fraser, 130 U. S. 611; Jolly *v.* Single, 16 Wis. 280; but *contra*, Ruthven W. Co. *v.* Great W. Ry. Co., 18 Up. Can. C. P. 316.

[c] Savannah, F. & W. Ry. Co. *v.* Pritchard, 77 Ga. 412; Van Winkle *v.* Wilkins, 81 Ga. 93; Sitton *v.* MacDonald, 25 S. C. 68.

[d] New Haven S. B. Co. *v.* Mayor, 36 Fed. Rep. 716.

[e] Wilson *v.* General I. S. C. Co., 47 L. J. Q. B. 239.

[f] Moore *v.* Davis, 49 N. H. 45.

[g] Carlisle *v.* Callahan, 78 Ga. 320.

the erection of a stable, the plaintiff may recover for the exposure of his cow to the weather and the diminution of her milk.(a)

§ 134. **Loss through deprivation of means of protection to person or property.**—Where the defendant wrongfully took possession of a place of safety behind a sea-wall to which the plaintiff was exclusively entitled, and thereby prevented the plaintiff's vessels from being protected from the weather, it was held by the Supreme Court of Massachusetts that the plaintiff could recover for the loss of his vessels, such injury being the natural and probable result of the misconduct. Morton, J., said: "He (a wrong-doer) is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated." (b)

Where, by the result of a collision for which the defendant was liable, the masts of the plaintiff's vessel were carried away, and she was wrecked in a storm which immediately arose, the defendant was required to pay compensation for the loss of the vessel.(c)

In an English case it appeared that in pursuance of

(a) Lange *v.* Wagner, 52 Md. 310. But where a wagon, by means of which the plaintiff was moving his goods over frozen roads, was wrongfully seized by the plaintiff and detained until spring, when the bad condition of the roads increased the expense of moving the property, it was held that this increased expense was too remote to be compensated. Vedder *v.* Hildreth, 2 Wis. 427.

(b) Derry *v.* Flitner, 118 Mass. 131.

(c) The George and Richard, L. R. 3 Adm. 466.

the defendants' agreement to admit the plaintiffs' ship into the dock at a certain time, and of notice to the plaintiffs to bring her at that time, they did so; but on the arrival of the ship she could not be admitted, owing to the dock chain being out of order. The day was stormy and the captain was ignorant of the river. After a discussion as to what should be done, with the pilot, who thought he might take the ship into a place of safety, the captain anchored her immediately outside the dock, where she grounded, and in consequence was much damaged. The jury found neither the captain nor pilot in fault, but disagreed as to whether the vessel might in fact have been taken to a place of safety.

It was held that the finding of the jury did not enable the court to say whether the defendants should be liable or not, and that the jury must come to an agreement on the points on which they had failed to agree; for the question whether the damage was too remote was not yet ripe for the decision of the court, but depended on the issue not yet found by the jury.(a)

Perhaps the strongest case is one in the English Common Pleas,[1] where an action was brought on the warranty of a chain-cable, that it should last two years, as a substitute for a rope cable of sixteen inches; and it was alleged that within the two years the cable broke, and that thereby an anchor, to which the cable was affixed, was lost. A verdict being found for the value of cable and anchor, a motion was made for a new trial, and it was insisted that the principle contended for by the plaintiffs would render the defendants liable for the loss

[1] Borradaile *v.* Brunton, 8 Taunton 535; s. c. 2 J. B. Moore, 582.

(a) Wilson *v.* Newport Dock Co., L. R. 1 Ex. 177.

of the ship, if on the breaking of the cable that event had happened. But the loss was held not too remote. Dallas, C. J., said: "The defendants warrant the cable sufficient to hold the anchor, and it is proved not to be sufficient. The holding of the anchor by the cable is the very essence of their warranty." Park, J., added: "The use of a cable is to hold the anchor." And a new trial was refused.(a)

§ 135. **Loss through detention of property.**—In an action against a carrier for delay in delivering goods, the plaintiff may recover compensation for decline in market value during the time of delay.(b) So where the defendant detained the plaintiff's logs by placing a boom across the stream, the plaintiff was allowed to recover for depreciation in the market while detained.(c) And where the defendant, by obstructing a river, delayed the plaintiff's logs until the annual dry season, when the plaintiff was put to additional expense in getting the logs to market, it was held that he might recover compensation for such increase of expense,(d) and for wages necessarily paid workmen for a reasonable time while waiting for the obstruction to be removed.(e)

The plaintiff, a cap manufacturer, ordered cloth of a certain style to be sent by the defendant, a common car-

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(a) This case is discredited by Alderson and Parke, B. B., in Hadley *v.* Baxendale, 9 Exch. 341, 347; but if the cable was sold for a special use, as it probably was, we see no reason for considering the loss remote.

(b) Collard *v.* Southeastern Ry. Co., 7 H. & N. 79; Columbus & W. Ry. Co. *v.* Flournoy, 75 Ga. 745; Cutting *v.* Grand T. Ry. Co., 13 All. 381; Scott *v.* Boston & N. O. S. S. Co., 106 Mass. 468; Lindley *v.* Richmond & D. R.R. Co., 88 N. C. 547.

(c) Plummer *v.* Penobscot L. A., 67 Me. 363; Mississippi & R. R. B. Co. *v.* Prince, 34 Minn. 71; Dubois *v.* Glaub, 52 Pa. 238.

(d) Gates *v.* Northern P. R.R. Co., 64 Wis. 64.

(e) McPheters *v.* Moose R. L. D. Co., 78 Me. 329.

rier. The defendant negligently delayed delivery of the cloth until the season for it was passed, and it was therefore less valuable. It was held that the plaintiff might recover compensation for loss in value of the cloth.(a)

In an action for wrongful attachment, the plaintiff may recover compensation for the deterioration in value of the goods while attached.(b)

§ 136. **Personal injury—False imprisonment.**—Where, in an action for an assault, the plaintiff sought to prove as special damages, that by reason of the assault he was driven from Alicant, in Spain, where he had previously done business as a merchant, it was held by far too remote.[1] So in an action for false imprisonment, where the plaintiff offered to prove as special damage, that having been imprisoned till after 2 o'clock P.M., and become unwell from his imprisonment, he did not go to a certain place where he would have obtained a situation if he had appeared at 2 o'clock, the alleged damage was held too remote.(c)

Where a passenger, having been unjustifiably ordered out of a railway carriage, left a pair of race-glasses on his seat, and lost them in consequence, the loss was held not to be the result of the wrongful act, and the passenger could not recover for it.(d) So the loss of an office for which an application had been made by the plaintiff before the

[1] Moore *v.* Adam, 2 Chitty 198.

(a) Wilson *v.* Lancashire & Y. Ry. Co., 9 C. B. (N. S.) 632.

(b) MacVeagh *v.* Bailey, 29 Ill. App. 606; Knapp *v.* Barnard, 78 Ia. 347.

(c) Hoey *v.* Felton, 11 C. B. (N. S.) 142. So in an action for wrongful expulsion from a railroad train. Carsten *v.* Northern P. Ry. Co., 47 N. W. Rep. 49 (Minn.).

(d) Glover *v.* London & S. W. Ry. Co., L. R. 3 Q. B. 25.

assault and battery, but withdrawn after it because of the disability occasioned by the battery, as the plaintiff alleged, was held too remote to be considered, although alleged in the declaration.(a) But in an action for false imprisonment it has been held that the plaintiff may recover compensation for loss of a contract of employment which would have extended beyond the term of imprisonment.(b)

§ 137. **Loss of service.**—Where the defendant, by the malicious arrest of the plaintiff's engineer while in the performance of his duties, deprived the plaintiff of the latter's services, it was held that the damage caused the defendant by the stoppage of its train was not too remote for compensation.(c) And where an operative in a mill had left the owner's employment without giving a fourteen days' notice as required in the agreement, it was held that the owner could recover loss suffered by the stoppage of the looms, caused by the fact that a jack ceased running which it was the operative's duty to attend to. He was allowed to recover for the three days' loss of the use of the looms, during which he was unable to get other workmen.(d)

§ 138. **Loss of a dependent contract.**—The defendant had agreed to let the plaintiff have the carrying of passengers from its station at D. to G. by stage. The plaintiff had also had the carriage of them by steamboat from G. to K., but not under any contract with the defendant. It was held (e) (1) that the plaintiff was not confined to the difference between what he was to receive

(a) Brown *v.* Cummings, 7 All. 507.
(b) Thompson *v.* Ellsworth, 39 Mich. 719.
(c) St. Johnsbury & L. C. R.R. Co. *v.* Hunt, 55 Vt. 570.
(d) Satchwell *v.* Williams, 40 Conn. 371.
(e) Frye *v.* Maine C. R.R. Co., 67 Me. 414.

for each passenger and what it would have cost him to carry the passengers; that he was also entitled to profits he would have made on way passengers, express, mail, etc., by being so situated (by his contract with the defendant) that he could have carried more cheaply than any one else. It was further held (2) that the plaintiff could not recover for loss of profits on the route from G. to K., for that loss did not arise, "according to the usual course of things, from the breach of the contract itself, nor was such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it." They were excluded, it was said, as in Fox *v.* Harding,[a] as profits arising from another independent and collateral undertaking, and, therefore, too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in question.

In Mandia *v.* M'Mahon[b] the plaintiff contracted to supply laborers to the defendant at $1.25 per day. He procured the laborers, but the defendant refused to hire them. It was held that the plaintiff could recover nothing for loss of commissions from the laborers.

§ 139. **Expense of preparation for performance.**—When the plaintiff has made preparation for performing a contract, he may, on breach, sometimes recover compensation for the expense of such preparation. Such compensation is usually included in the general damages given for breach of the contract; but if for any reason a separate allowance is necessary, it will be made.[c]

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[a] 7 Cush. 516, 522.

[b] 17 Ont. App. 34.

[c] U. S. *v.* Behan, 110 U. S. 338; Brent v. Parker, 23 Fla. 200; Mandia *v.* M'Mahon, 17 Ont. App. 34. But on a *common count* a plaintiff cannot recover for labor performed, with the expectation of making it available

Thus in an action for breach of a contract to refer a dispute to referees, it was held that the plaintiff might recover the expenses necessarily incurred in preparing for trial before the referees, except so far as they were necessary for the subsequent trial of the action in court, and also might recover payments made to counsel and witnesses on account of the expected trial before the referees.(a)

Where the agreement is that the plaintiff shall come from a distance and take employment with the defendant, in an action for breach of the contract of employment, the plaintiff may recover the expense of removal. Thus where a defendant had engaged the plaintiff to remove to Indiana, to carry on business there, and failed to furnish the stock necessary for so doing; the court allowed the plaintiff as damages compensation for the loss of his time in removing to Indiana and back again to his original domicile.[1]

So, in New Hampshire, where the defendant proposed by letter to the plaintiff that the latter should come to that State from Minnesota; agreeing, if he would do so, to give him and his wife a year's board, and allow him to carry on the defendant's farm; it was held that the expenses incurred by the plaintiff in removing his family, and probably compensation for his necessary loss of time, might be recovered.(b) And upon breach of an agreement that the plaintiff shall have the exclusive sale of the defendant's goods in a certain territory, the plaintiff

[1] Johnson *v.* Arnold, 2 Cush. 46.

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in the performance of a contract with the defendant, which contract the defendant terminated before any part had been performed. Curtis *v.* Smith, 48 Vt. 116.

(a) Call *v.* Hagar, 69 Me. 521; Pond *v.* Harris, 113 Mass. 114.

(b) Woodbury *v.* Jones, 44 N. H. 206.

may recover the advertising expenses and other expenditures in preparation for sale.(a)

§ 140. **Expense incurred on faith of the defendant's contract.**—Where a lessor had agreed to pay the lessee for any damage sustained in consequence of fitting up the premises if he ousted him, the lessee was allowed to recover the expense of fitting them up, *less* the use which he had had for two years. In the estimate should be included, it was said, the injury to the carpets by being cut.(b)

Expense of removal to leased premises, of which the landlord fails to give possession, may be recovered. Thus where an agreement had been made to let certain premises as a tavern stand, and the plaintiff had removed his family to take possession, which was refused, it was held that the plaintiff was entitled to recover, not only the value of the lease, but also his expenses in removing his family and furniture, and this without any allegation of special damage in the declaration.[1]

So where the defendant agreed to set up a machine for the plaintiff, and give him the exclusive use of such machines in his county, the plaintiff, upon breach of the contract, may recover the loss incurred by procuring a boiler.(c)

§ 141. **Stock purchased on faith of lease or conveyance.**—Loss on a stock of goods bought on faith of a lease of business premises of which the lessor refuses to give

[1] Driggs *v.* Dwight, 17 Wend. 71; Lawrence *v.* Wardwell, 6 Barb. 423; *acc.* Giles *v.* O'Toole, 4 Barb. 261.

(a) Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. Rep. 440; Smith *v.* Weed S. M. Co., 26 Oh. St. 562; Sterling O. Co. *v.* House, 25 W. Va. 64.

(b) Pratt *v.* Paine, 119 Mass. 439. *Acc.* in a case of wrongful ejectment. Redon *v.* Caffin, 11 La. Ann. 695.

(c) Dean *v.* White, 5 Ia. 266.

possession is, it would seem, too remote. Nevertheless, in an early case, in which the plaintiff declared for breach of an agreement to let the plaintiff have the use of certain mills for six months, in consideration of £10, it appeared that the mills were worth but £20 per annum, and yet damages were given to £500, by reason of the stock laid in by the plaintiff; and, *per curiam*, "the jury may well find such damages, for they are not only bound to give the £10, but also all the special damages."[1] The Supreme Court of New York, commenting on this case, said: "Very likely it appeared that the breach of contract was committed to favor some particular interest of the defendant, or his friend, though the case mentions a simple refusal to perform";[2] but perhaps it may rather be brought within the rule of Hadley *v.* Baxendale, which will be presently stated, both parties knowing the object to which the mills were to be applied, and the loss of the plaintiff's stock being considered as contemplated by them.

Recent authorities hold such a loss not to be compensated, in the absence of notice. Thus, where the leased premises consisted of a farm, the plaintiff was not allowed to recover the loss he suffered by a purchase of stock for it.(a)

In a similar action, where machinery of a less capacity than that bargained for was furnished for a new mill, it was held that loss on large purchases of stock for running a mill of the agreed capacity and loss caused by abandoning the planting for the milling business, were both too remote.(b) Where the defendant broke his contract to convey land to the plaintiff, the latter cannot

[1] Nurse *v.* Barns, T. Raym. 77.

[2] Blanchard *v.* Ely, 21 Wend. 342.

(a) Robrecht *v.* Marling, 29 W. Va. 765.

(b) Willingham *v.* Hooven, 74 Ga. 233.

recover compensation for money paid an architect for plans for a proposed building on the premises.(a) But he may recover for expense of examining title.(b)

Natural Consequences.

§ 142. **Unnatural or unexpected consequences not compensated.**—A consequence, however proximately it follows the injury, will not be compensated unless it follows the injury in the usual course of things, or, as it is generally expressed, is a natural consequence. In one sense every result naturally follows its cause; everything happens subject to the laws of nature. In order to be compensated, a consequential injury must be such a result of the injury as according to common experience and the usual course of events might reasonably have been anticipated.(c)

§ 143. **Natural consequences in actions of tort.**—Thus in an action for personal injury it appeared that the plaintiff dealt in gold, which he kept locked in a safe, and that no one but himself knew the combination. As a consequence, no gold could be sold during the absence caused by the injury. This consequence, however, was held to result from "his abnormal and peculiar mode of doing his business," and to be too unexpected for compensation.(d) In an action for injury to a mare, damage to her colt from loss of milk cannot be recovered.(e)

(a) Chamberlain *v.* Brady, 49 N. Y. Super. Ct. 484.

(b) Walker *v.* Moore, 10 B. & C. 416.

(c) Hoadley *v.* Northern Transportation Co., 115 Mass. 304; Flori *v.* St. Louis, 69 Mo. 341; Forney *v.* Geldmacher, 75 Mo. 113; Hughes *v.* McDonough, 43 N. J. L. 459; Wiley *v.* West Jersey R.R. Co., 44 N. J. L. 247; Warwick *v.* Hutchinson, 45 N. J. L. 61; Chalk *v.* Charlotte, C. & A. R.R. Co., 85 N. C. 423; Daniels *v.* Ballantine, 23 Oh. St. 532; Jackson *v.* N. C. & S. L. Ry. Co., 13 Lea 491; Borchardt *v.* Wausau Boom Co., 54 Wis. 107.

(d) Phyfe *v.* Manhattan Ry. Co., 30 Hun 377.

(e) Teagarden *v.* Hetfield, 11 Ind. 522; Gamble *v.* Mullin, 74 Ia. 99.

In an action under the Civil Damage Act, it appeared that the plaintiff's intestate, when drunk, made an attack on a neighbor's house and was wounded by a shot, and died from the effect of the wound. This was held not to be the natural result of the defendant's act in selling liquor.(a) But where the defendant, in violation of a statute, sold liquor to a slave, who died of drunkenness and exposure, the jury held the death to be the natural result of the defendant's act, and he was therefore obliged to give compensation for it.(b) Where an agent, authorized to sell a flock of sheep, sold a portion of them with knowledge that they were diseased, and the diseased sheep were mixed with another flock, it was held that the claim of the purchaser against the principal was not limited to the loss of the sheep purchased, but extended to that of the others to which the distemper was communicated; and the court said, "This damage was the natural consequence of the fraudulent act of the defendant's agent."[1] This case we have seen similarly decided by Pothier.(c) But in an action for falsely representing that a horse was kind in harness, the plaintiff has been held not entitled to recover the value of a wagon and harness broken by the horse.(d)

The distinction between unnatural and remote consequences, as has been pointed out, is often difficult to trace. Many of the cases cited on the question of re-

[1] Jeffrey *v.* Bigelow, 13 Wend. 518; see § 131.

(a) Schmidt *v.* Mitchell, 84 Ill. 195.

(b) Harrison *v.* Berkley, 1 Strobh. L. 525.

(c) § 117.

(d) Case *v.* Stevens, 137 Mass. 551. But the loss in this case might well have been held a natural consequence of the injury.

moteness might also be cited as illustrations of the rule excluding compensation for unnatural consequences.

§ 144. **The rule in Hadley v. Baxendale.**—The application of the rule in actions of contract is governed by a series of decisions founded on the leading case of Hadley *v.* Baxendale.([a])

* The plaintiffs were owners of a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to an engineer, to serve as a model for a new one. On making the contract, the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery; the shaft was kept back in consequence; and in an action for breach of contract, they claimed, as specific damages, the loss of profits while the mill was kept idle. It was held that if the carrier had been made aware that a loss of profits would result from delay on his part, he would have been answerable. But as it did not appear he knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such an extent. The court said:

"We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the

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([a]) 9 Ex. 341; 23 L. J. Ex. 179; 18 Jur. 358; 26 Eng. L. & Eq. 398. So entirely is the later law founded on this case, that the great body of cases since decided involving the measure of damages for breach of contract, resolve themselves into a continuous commentary upon it.

contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract." **

§ 145. **Griffin v. Colver.**—The leading case in this country was decided in New York on somewhat similar facts.(a)

The plaintiff agreed to build and deliver to the defendant, on a certain day, a steam engine which he knew the defendant intended to use to drive certain machinery for sawing and planing lumber. In an action for the price, the defendant recouped damages for the plaintiff's delay in delivering the engine. It was held that the measure of damages was not, as claimed by the defendant, the net average value of the use at the place where it was located for the purpose for which it was intended and in connection with defendant's machinery, and it was said that the proper method of measuring the damages was to ascertain what would have been a fair price to pay for the use of the machinery, in view of all the hazards

(a) Griffin *v.* Colver, 16 N. Y. 489.

and chances of the business. In the course of the opinion the court said : ([a])

"The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained ; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation ; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance : That the damages must flow directly and naturally fromthe breach of contract, is a mere mode of expressing the first ; and that they must be not the remote but proximate consequence of such breach, and must be not speculative or contingent, are different modifications of the last."

Selden, J., cited Blanchard *v.* Ely,([b]) as an instance of profits which were the direct consequence, but were too uncertain. He continued :

"So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered ; as in the case of the loss by the clergyman of his tithes by reason of the failure to deliver the horse."

The decision in this case was that profits could be recovered, since the defendant had notice of the consequence of his delay.

§ 146. **Meaning of the rule in Hadley v. Baxendale.**—The rule in Hadley *v.* Baxendale, would seem to mean that the plaintiff may recover such damages as normally result from the breach of contract ; or he may show certain special facts to have been known to the defend-

([a]) Selden, J.. at p. 494. ([b]) 21 Wend. 342, *supra*.

ant at the time of the contract, which would give notice to him that a breach of the contract would result in an otherwise unexpected loss, and in such case the plaintiff might recover his special loss. The decision in the case was clearly that loss of profits of a mill was not a natural consequence of a carrier's delay in delivering machinery; but the court added that if the special circumstances had been known at the time of the contract of bailment, the damages claimed might have been recovered.

The New York court, in Griffin *v.* Colver, took substantially the same view of the decision. The court says, as quoted above, "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, *that is*, must be such as might naturally be expected to follow its violation. . . . . That the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing" the former principle.

§ 147. Hadley v. Baxendale as interpreted in England.— It has been intimated in one English case that the rule in Hadley *v.* Baxendale applies only to profits; ([a]) this view, however, has not been followed. According to the interpretation which has finally prevailed in England, the rule was not intended to change materially what has always been the common law, namely, that the plaintiff can recover for the damage directly resulting from the defendant's breach of contract, but not remote damage; that the rule is only a new way of stating the well-estab-

([a]) Wilson *v.* Newport Dock Co., L. R. 1 Ex. 177. In Gee *v.* Lancashire & Y. Ry. Co., 6 H. & N. 211, Mr. Baron Wilde observed: "For my own part I think that, although an excellent attempt was made in Hadley *v.* Baxendale to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases; and when the matter comes to be further considered, it will probably turn out that there is no such thing as a rule, as to the legal measure of damages, applicable in all cases."

lished principle that damages can only be given for the natural consequences of a breach of contract, "natural" being defined to mean "arising in the usual course of things," but with the extension that damages which were in the actual contemplation of the parties can also be recovered. Under this interpretation of the rule, the plaintiff can always recover for the damage directly resulting from the defendant's breach of contract, although that damage did not arise according to the usual course of things, nor was in the contemplation of the parties. Where the damages claimed are not direct, but the question is as to the *degree* of remoteness for which a party is to be held, this rule limits his responsibility to the consequences which would result in the usual course of things, or those which were in the contemplation of the parties.(a) In a case in the English Court of Queen's Bench,(b) Blackburn, J., said: "That argument seems to assume that the principle laid down in Hadley *v.* Baxendale is, that the damages can only be what both parties contemplated, at the time of making the contract, would be the consequence of the breach of it; but that is not the principle laid down in Hadley *v.* Baxendale. The court say, 'We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself,' that is one alternative—'or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the

(a) Hobbs *v.* London & S. W. Ry. Co., L. R. 10 Q. B. 111.
(b) Cory *v.* Thames I. W. & S. B. Co., L. R. 3 Q. B. 181, 188.

probable result of the breach of it.'" Cockburn, C. J., agreed with this interpretation.

In Hammond *v.* Bussey (a) Lord Esher, M. R., said: "The rule is laid down (in Hadley *v.* Baxendale) thus: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract . . . . should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself.' That is the enunciation of the rule with regard to damages for a breach of contract where no special circumstances arise, and would apply to this case if there had been no sub-contract which the defendant knew to exist or to be likely to be made. The rule goes on to state what the measure of damages is where there are special circumstances, as follows: 'or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.' It has been argued that these words are not an enlargement of the former part of the rule, but I cannot take that view of them. It is to be observed that the words are not 'such damages as were in fact in the contemplation of the parties at the time they made the contract,' which would have raised a question of fact for the jury, but 'such as may reasonably be supposed to have been in the contemplation of the parties,' not as the inevitable but as 'the probable result of the breach.' The next sentence of the judgment is, I think, to be considered rather as a valuable exemplification of the rule, an illustration of the circumstances under which the second branch of the rule would apply, than as part of the rule itself."

(a) 20 Q. B. Div. 79, 88.

§ 148. **Hadley v. Baxendale as interpreted in New York.** —The New York courts, following Griffin *v.* Colver, state the rule in Hadley *v.* Baxendale to be that a party who breaks a contract is held liable for such damages only as he probably contemplated as the result of a breach when he entered into the contract, or, as it is often expressed, for such damages as may fairly be supposed to have been in the contemplation of the parties. It has been thought that this interpretation is different from what we have just seen to be the English interpretation. It has been said that the principle of the civil law had been introduced into our law by the New York cases, namely, that the consequences compensated must be *not only* natural, but actually in the minds of the parties at the time the contract was made. The language used by the courts in some of the New York cases may have lent color to this notion; but it is clear, in view of all the cases in that State, that the interpretation adopted is another and perhaps looser way of stating the same doctrine which has prevailed in England; that is, that *both* the consequences naturally flowing from the breach *and* such consequences as seem natural only in the light of special circumstances communicated to the defendant at the time of the contract can be recovered.([a]) This

([a]) In New York, however, the language used in Hadley *v.* Baxendale, the "usual course of things," is seldom adopted as a guide. Instead of it, as we have seen, the courts have adopted the expression, "such as may fairly be supposed to have been in the contemplation of the parties." We think the "usual course of things" preferable, for the New York form of the rule is sometimes misleading. See Little *v.* Boston & Maine R.R., 66 Me. 239; Collard *v.* S. E. Ry. Co., 7 H. & N. 79; Gee *v.* Lancashire & Yorkshire Ry. Co., 6 H. & N. 211; Wilson *v.* Lancashire & Yorkshire Ry. Co., 9 C. B. N. S. 632; Wilson *v.* Newport Dock Co., L. R. 1 Ex. 177. It is possible to say, with some definiteness, what would follow in the usual course of things; but what the contemplation of the parties *probably* was, is a very difficult matter to arrive at. The criticism of Alderson, B., in Wilson *v.* Newport Dock Co., L. R. 1 Ex.

will more clearly appear upon an examination of the language of the court in some of the cases following Griffin *v.* Colver.

In Baldwin *v.* United States Tel. Co.,[a] Allen, J., said:

"Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, ... it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the circumstances for which, it was made."

In Ward *v.* New York C. R.R. Co.,[b] Peckham, J., said:

"Where a contract has been violated, the law intends to give to the party injured the damages caused thereby; that is, the natural and proximate damages caused by the breach. It is supposed that both parties contemplated the consequences of such breach at the time they made the contract, and acted accordingly both in making and in performing or violating its provisions."

In Booth *v.* Spuyten Duyvel R. M. Co.,[c] Church, C. J., said:

"It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly."

177, seems also very just, viz., that parties usually contemplate the performance and not the breach of contracts.

[a] 45 N. Y. 744, 750. [b] 47 N. Y. 29, 32. [c] 60 N. Y. 487, 492.

In Devlin *v.* The Mayor,(a) Allen, J., said:

"It (the rule) secures to the injured party as a compensation only such advantages as the parties must be deemed to have had in their minds in making the agreement, and excludes all contingent and uncertain profits, everything that may not reasonably be supposed to have been within the contemplation of the contracting parties, and would not naturally follow the breach."

§ 149. **General results of Hadley v. Baxendale.**—The rule in Hadley *v.* Baxendale has been discussed in a multitude of cases, and, on the whole, it will be found that the general tendency of judicial opinion in the United States as well as in England is that no new rule of damages has been introduced; that the plaintiff recovers such damages as are proximate and natural, and that in ascertaining what are natural consequences, we must take into the account all the circumstances of the case, including all facts bearing on the question which were in the knowledge of both parties, even though these be such as would not necessarily, without such knowledge, enter into it. It is on this principle that the plaintiff is allowed to charge the defendant with loss on sub-contracts, sales, etc., on proving *notice*, which, in the absence of such notice, would not be treated as natural or expected consequences.

§ 150. **Hobbs' Case.**—The theory at one time held by some judges that the rule in Hadley *v.* Baxendale changed the law, had its effect in the decision of an English case which must here be noticed. Hobbs *v.* London & S. W. Ry. Co.(b) was an action for breach of contract. The plaintiff, with his wife and two children, took tickets to H. on the defendants' railway. They were set down at E. It being late at night, the plaintiff could not get a

(a) 63 N. Y. 8, 25. (b) L. R. 10 Q. B. 111.

wagon or accommodation at an inn. They had, therefore, to walk five or six miles on a rainy night, and the wife caught cold, was laid up in bed for some time, and was unable to assist her husband. Expenses were incurred for medical attendance. The jury found £8 for inconvenience suffered by having to walk home, and £20 for the wife's illness and its consequences. The Queen's Bench held the plaintiff could recover the £8, but not the £20. Cockburn, C. J., said, that Hamlin *v.* Great Northern Ry. Co.(a) did not decide that a plaintiff could not recover for inconvenience which was the immediate consequence of breach of the contract. That case only decided that damages for delay should not include the loss of appointments with customers. As to the item of £20, the Lord Chief Justice declared that it was too remote, and on that question he said: "I think that the nearest approach to anything like a fixed rule is this: That, to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of." Blackburn, J., agreed with these remarks of the Lord Chief Justice.

This case was considered later in McMahon *v.* Field.(b) In the latter case the defendant contracted with the plaintiff to furnish stabling for his horses during a fair, but instead of doing so he let his stable to a third party,

(a) 1 H. & N. 408. (b) 7 Q. B. Div. 591.

who turned out the plaintiff's horses in the middle of the night without their blankets. It was held that the defendant, in an action of contract, must compensate the plaintiff for a loss caused by his horses taking cold. Brett, L. J., said "it was not the necessary consequence of the breach of contract, but I have no doubt that it was the probable consequence, and if so, it follows that it was in the contemplation of the parties within the meaning of the third rule."

In this case the wrongful act was the lease to the third party; the breach of a contract to furnish stabling would naturally result in the horses being exposed. But does not the breach of a contract to carry a passenger also naturally result in exposure? The Lord Justice distinguished Hobbs' Case (though granting that there was little difference), and so instead of overruling it, said merely that "he was not contented with it."

In Murdock *v.* Boston & A. R.R. Co.(a) the plaintiff was wrongfully ejected from the train and delivered to a police officer, who detained him over night. It was held that in an action for breach of the contract of carriage the plaintiff could not recover for the indignity of his imprisonment, mental suffering, and sickness produced by a cold caught.

The court said: "Without inquiring whether all the elements of damage admitted by the court would be competent, if this had been an action of tort for an assault and false imprisonment, we are of opinion that too broad a rule was adopted in this case. Damages for the breach of a contract are limited to such as are the natural and proximate consequences of the breach, such as may fairly be supposed to enter into the contemplation of the parties when they made the contract, and such as might naturally be expected to result from its violation."

(a) 133 Mass. 15.

This decision is vested on the ground that the action was not tort. The conductor who ejected the passenger was himself a railroad police officer, and delivered the passenger into the hands of the local police; the act by which the contract was broken was therefore a tort, and in those jurisdictions in which all forms of action have been abolished, it would probably have been impossible to tell whether the action sounded in tort or contract, or both. The measure of damages should not depend on a distinction so difficult of application.

In the case of Williams *v.* Vanderbilt (a) the defendant agreed to transport the plaintiff to California by the way of the Isthmus of Panama; but failed to furnish transportation across the Isthmus. After waiting some time in the unhealthy climate of the Isthmus, the plaintiff was taken back to his starting-point; but meanwhile he had contracted a sickness through remaining on the Isthmus. It was held that he could recover compensation for loss of time and expense caused by the sickness. The form of action was tort.

There can be little doubt that the decisions in McMahon *v.* Field and Williams *v.* Vanderbilt are sound. The contrary decision rests on a mistaken understanding of one of the forms of the rule in Hadley *v.* Baxendale, that is, that such damages only can be recovered as the parties may be supposed to have had present in mind at the time of the contract. Hobbs' Case is usually said to be law in this country, but its effect is much restricted, in most jurisdictions, by holding that it does not apply where the act by which the contract was broken was itself a tort.(b)

§ 151. **Cory v. Thames I. W. & S. B. Co.**—In Cory *v.* Thames I. W. & S. B. Co.(c) the defendants had agreed

(a) 28 N. Y. 217.

(b) See the case discussed in the chapter on Carriers.

(c) L. R. 3 Q. B. 181.

to sell and deliver to the plaintiffs, within a certain time, the hull of a floating boom derrick, supposing the plaintiffs intended to use it as a coal store. The plaintiffs, in fact, intended to apply it to the purpose of transhipping coal directly from colliers to barges without the necessity of an intermediate landing, a purpose which was unusual and unknown to the defendants. It was held that the plaintiffs could recover damages to the extent of the profits which would have resulted from its use as a coal store. They, in fact, suffered a much greater damage, for they would have derived a much larger profit from the use they intended than from its use as a coal store.

In reply to the argument of the defendant, that damages for loss of use of the derrick for a store were not within the contemplation of the parties, Cockburn, C. J., said (p. 187):

"The two parties certainly had not in their common contemplation the application of this vessel to any one specific purpose. The plaintiffs intended to apply it in their trade, but to the special purpose of transhipping coals; the defendants believed that the plaintiffs would apply it to the purpose of their trade, but as a coal store. I cannot, however, assent to the proposition that, because the seller does not know the purpose to which the buyer intends to apply the thing bought, but believes that the buyer is going to apply it to some other and different purpose, if the buyer sustains damage from the non-delivery of the thing, he is to be shut out from recovering any damages in respect of the loss he may have sustained. I take the true proposition to be this. If the special purpose from which the larger profit may be obtained is known to the seller, he may be made responsible to the full extent. But if the two parties are not *ad idem quoad* the use to which the article is to be applied, then you can only take as the measure of damages the profit which would result from the ordinary use of the article for the purpose for which the seller supposed it was bought."

§ 152. Loss caused by unexpected natural causes supervening on the defendant's act.—When the act of the de-

fendant brought property into such a situation that it was afterwards injured or destroyed by unexpected natural causes, the injury is too remote a consequence of the defendant's wrong to be compensated. Thus, when a carrier negligently delays the carriage of goods, which are overtaken by flood or storm and destroyed, the carrier is not liable, though but for the delay the goods would have been in safety.([a])

Where the defendant had contracted to beat the plaintiff's rice before any other, but did not do so, as a result of which it remained over night in the mill and was burned with the mill, it was held that the loss of the rice was too remote a result of the breach of contract to be recovered.([b])

The defendant contracted to pay damages caused by cutting away a dam and allowing the river to flow in and out of a basin previously protected by it. The river, a year later, became dammed up by ice, and the water rushed into the basin with such unusual velocity as to injure plaintiff's property there. The loss was held not to be in contemplation of the parties, and compensation was not allowed for it.([c])

§ 153. **Through deprivation of material for manufacture or trade.**—It is not the natural consequence of the failure or delay of a carrier to deliver machinery that the use of a mill should be lost; consequently, in the absence of notice or of facts in the knowledge of the carrier indi-

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([a]) Memphis & C. R.R. Co. *v.* Reeves, 10 Wall. 176; Denny *v.* New York C. R.R. Co., 13 Gray 481; Daniels *v.* Ballantine, 23 Oh. St. 532; Morrison *v.* Davis, 20 Pa. 171; Parmalee *v.* Wilks, 22 Barb. 539, and Read *v.* Spaulding, 30 N. Y. 630, seem to be opposed to this rule; but in the latter case the court took notice of the fact that the defendant was liable apart from any question of delay.

([b]) Ashe *v.* De Rossett, 5 Jones L. 299.

([c]) People *v.* Albany, 5 Lans. 524.

cating that such would be the case, the owner cannot recover damages for loss of use of the mill.([a])

A dentist cannot recover against a carrier, in an action for the loss of a set of dentist's instruments, the profits and earnings he might have made if the loss had not occurred; ([b]) unless the carrier had notice of the special use. So upon failure to deliver a brickmaking machine the owner, in the absence of notice, cannot recover from the carrier the wages of hands kept idle for want of the machine.([c]) So where an editor, by not receiving some "plate paper," on which to print a frontispiece for his magazine, suffered damage in loss of circulation and of credit, and in having a number of copies left on his hands, such damages could not be recovered.([d]) And the stoppage of a mill not being a normal consequence of delay in transporting cotton, the mill owner in an action against the carrier for delay cannot, in the absence of notice, recover compensation for the loss of use of his mill.([e]) For the same reason, in an action against a carrier for delay in delivering coal, a mill owner cannot recover compensation for the loss of use of his mill.([f]) And in an action for failure to deliver hogs bought of the defendant, the plaintiff cannot recover compensation for the loss he suffered by having hired cars to transport the hogs.([g])

In an action against a carrier for the loss of a package containing plans, the carrier having no notice of the

([a]) Hadley *v.* Baxendale, 9 Ex. 341; Pacific E. Co. *v.* Darnell, 62 Tex. 639; Thomas B. & W. M. Co. *v.* Wabash, St. L. & P. Ry. Co., 62 Wis. 642. See, however, Waters *v.* Towers, 8 Ex. 401, *semble contra.*

([b]) Brock *v.* Gale, 14 Fla. 523.

([c]) Johnson *v.* Mathews, 5 Kas. 118; Ruthven W. Co. *v.* Great W. Ry. Co., 18 Up. Can. C. P. 316.

([d]) Parsons *v.* Sutton, 66 N. Y. 92.

([e]) Gee *v.* London & Y. Ry. Co., 6 H. & N. 211.

([f]) Cooper *v.* Young, 22 Ga. 269.

([g]) Cuddy *v.* Major, 12 Mich. 368.

contents of the package, the owner cannot recover damages for the delay in constructing the house, caused by the loss of the plans.([a])

A delay in delivering goods (by the seller or the carrier) does not normally result in loss of business; consequently the owner cannot, in an action for the delay, recover compensation for such loss.([b]) So where the owner used the goods to hire out as regalia for processions, he cannot recover compensation for the hire he would have obtained for them.([c])

So upon a delay of one day by the defendant, a warehouseman, in delivering cotton, the plaintiff cannot recover compensation for the payment of an unusually high rate of interest on money borrowed (as the custom was) on security of the cotton.([d]) And in an action for failure to furnish the fire box for an engine, the plaintiff cannot recover damages he was obliged to pay to a third party for failure to deliver the engine to him at an agreed time.([e])

But if the defendant contracted to deliver raw material to the plaintiff, a manufacturer, and failed to do so, and no other material of the sort could be procured, the defendant is liable for the resulting loss. "If an article of the same quality cannot be procured in the market, its market price cannot be ascertained and we are without the necessary data for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties,

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([a]) Mather *v.* American E. Co., 138 Mass. 55.

([b]) Anderson *v.* Northeastern Ry. Co., 4 L. T. R. (N. S.) 216; Baltimore & O. Ry. Co. *v.* Pumphrey, 59 Md. 390; Buffalo B. W. C. *v.* Phillips, 64 Wis. 338.

([c]) Hales *v.* London & N. W. Ry. Co., 4 B. & S. 66.

([d]) Swift *v.* Eastern W. Co., 86 Ala. 294.

([e]) Portman *v.* Middleton, 4 C. B. (N. S.) 322.

for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article, or not receiving the advance on his contract price upon any contract which he had himself made in reliance upon the fulfillment of the contract by the vendor."([a])

§ 154. **Telegraph companies.**([b])—Where a message is delayed by a telegraph company, no consequential damages can be recovered unless the sender or the language of the message itself gives an indication of its special importance.([c]) So in the absence of notice no consequential damages can be recovered for delay in transmitting a cipher message.([d])

§ 155. **Agreement to repair.**—The natural consequences of a failure to keep the drains of premises in repair are a loss of rent and injuries caused by the stench.([e]) On the breach of a covenant to repair contained in the lease of a hotel, the lessee may recover compensation for the loss of use of rooms rendered useless by the disrepair.([f])

§ 156. **Loss of a sub-contract.**—The loss suffered on a sub-contract (either through the necessity of paying damages on it or through loss of the benefit of it) in the ab-

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([a]) Sharswood, J., in McHose *v.* Fulmer, 73 Pa. 365.

([b]) The special questions that arise in connection with telegraph companies will be considered at large in a later chapter.

([c]) Sanders *v.* Stuart, 1 C. P. D. 326; Deslottes *v.* Baltimore & O. T. Co., 40 La. Ann. 183; but a contrary rule now prevails in some jurisdictions: see chapter on Telegraph Companies.

([d]) Mackay *v.* Western U. T. Co., 16 Nev. 222; Cannon *v.* Western U. T. Co., 100 N. C. 300; Daniel *v.* Western U. T. Co., 61 Tex. 452; Candee *v.* Western U. T. Co., 34 Wis. 471.

([e]) Jutte *v.* Hughes, 67 N. Y. 267.

([f]) Myers *v.* Burns, 35 N. Y. 269.

sence of notice is not a normal result of a breach of contract and will not be compensated.(a) There is, however, an exception in certain cases where the contract contemplates a sub-contract. A building contract, for instance, contemplates the purchase of materials, and on breach of it the builder may recover compensation for the damages he is compelled to pay on a contract to furnish certain necessary materials.(b) So the purchaser of coal, warranted to be of a certain quality by a coal dealer, contemplates a resale of it as of that quality: and if the dealer is sued by a purchaser from him on account of the inferior quality of the coal he may recover, in an action on the warranty, the damages and costs of that action.(c) In the absence of a custom for reselling at once, a resale before delivery cannot be shown for any purpose. Thus, in England, a resale of land before the deeds are passed, cannot be shown to fix damage on failure to convey.(d)

Notice.

§ 157. **Notice—General rule.**—The effect of notice, under the rule in Hadley *v.* Baxendale, is to enlarge the boundaries of natural consequences. The general rule is, that the notice must be such as to inform the defendant of any extraordinary damages which will be suffered.(e) Only the natural and proximate consequences of the facts

(a) Caledonian Ry. Co. *v.* Colt, 3 Macq. 833, 3 L. T. R. (N. S.) 252 (H. of L.); Thol *v.* Henderson, 8 Q. B. D. 457; Wallace *v.* Ah Sam, 71 Cal. 197; Rahm *v.* Deig, 121 Ind. 283; Brown *v.* Allen, 35 Ia. 306; Mihills M. Co. *v.* Day, 50 Ia. 250; Wetmore *v.* Pattison, 45 Mich. 439; Devlin *v.* Mayor, 63 N. Y. 8; Horner *v.* Wood, 16 Barb. 386; Lindley *v.* Richmond & D. R.R. Co., 88 N. C. 547; Parks *v.* O'Connor, 70 Tex. 377.

(b) Smith *v.* Flanders, 129 Mass. 322.

(c) Hammond *v.* Bussey, 20 Q. B. Div. 79; *acc.* Thorne *v.* McVeagh, 75 Ill. 81.

(d) Walker *v.* Moore, 10 B. & C. 416.

(e) Horne *v.* Midland Ry. Co., L. R. 7 C. P. 583; 8 C. P. 131.

made known can be recovered. Thus, where the defendant had notice that goods were bought by the plaintiff for the purpose of fulfilling a sub-contract, the plaintiff cannot recover for loss of the sub-contract, unless he shows that the goods could not be elsewhere procured.([a]) A delay in the work for which the goods were bought would be a natural result of their non-delivery, and the consequences of delay may be recovered; but an entire cessation of the work is not a natural result.([b]) Where the defendant contracted to supply rigging for a vessel and failed to do so, and the plaintiff was unable to procure rigging in the market, it was held that he could not recover for the loss of use of the vessel. Notwithstanding the notice of the object, another abnormal factor intervened—the peculiar state of the market; consequently, the notice given in this case was not sufficient to inform the defendant of the danger of extraordinary loss.([c])

A defendant has notice of what will occur in the ordinary course of business; for instance, that goods bought by a dealer in them will be resold,([d]) but not that a failure to deliver goods to a manufacturer will cause a stoppage of his mill,([e]) nor that on a contract to sell goods the goods will be resold before delivery.([f])

§ 158. Notice of consequences of a breach of contract.— The theory that mere notice of an unusual consequence likely to follow a breach of contract given before breach

([a]) If they cannot, he may recover compensation for the loss of a sub-contract. McHose *v.* Fulmer, 73 Pa. 365.

([b]) Friend & T. L. Co. *v.* Miller, 67 Cal. 464; Bridges *v.* Stickney, 38 Me. 361.

([c]) Clark *v.* Moore, 3 Mich. 55.

([d]) Hammond *v.* Bussey, 20 Q. B. Div. 79.

([e]) Gee *v.* Yorkshire & L. Ry. Co., 6 H. & N. 211.

([f]) Williams *v.* Reynolds, 6 B. & S. 495.

gives a right to recover compensation for such consequence was suggested by the able opinion of Bramwell, B., in Gee *v.* London & Y. Ry. Co. :(a) "I am not sure that another qualification might not be added which would be in favor of the plaintiff in this case, viz. : that in the course of the performance of the contract one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say, 'If, after that notice, you persist in breaking the contract, I shall claim the damages which will result from the breach.'" The majority of the court, however, took a different view. And however reasonable the view may be in itself, another rule is firmly established. Hadley *v.* Baxendale, as we have seen, held that damages for breach of contract were limited to such as were either normal or communicated *at the time of the contract.*

§ 159. **Notice must form the basis of a contract.**—It appears that the notice must be more than knowledge on the defendant's part of the special circumstances. It must be of such a nature that the contract was to some extent based upon the special circumstances. This appears from the language of the courts in many cases where the subject is discussed. In Smeed *v.* Foord,(b) Campbell, C. J., doubted whether notice could have any effect in changing the rule of damages, unless it formed part of the contract. In British Columbia S. M. Co. *v.* Nettleship,(c) Willes, J., said: "The mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts

(a) 6 H. & N. 211. (b) 1 E. & E. 602, 608. (c) L. R. 3 C. P. 499, 509.

the contract with the special condition attached to it." In Booth *v.* Spuyten Duyvil R. M. Co.,(a) Church, C. J., stated, as his opinion, that notice of the object of the contract would not, of itself, change the measure of damages, "unless it formed the basis of an agreement." Proof of notice, of course, cannot be received to *vary* the contract, which always speaks for itself; it is merely an attendant circumstance, which, like any other matter in evidence, affects the consequences of the breach and the measure of recovery.

Hadley *v.* Baxendale lays no stress on the question whether the contract was founded upon or influenced by the notice; but the weight of recent authority seems to be in accordance with these opinions, to the effect that the notice must be such as that the contract was in some degree founded on it. The defendant sold goods to rig a vessel, and damages were claimed for loss of use of the vessel. The Supreme Court of Michigan said: "To create such extraordinary liability, there must in every case be something in the terms of the contract, read in the light of the surrounding circumstances, which show an intention on the part of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise." (b)

The purchase price of goods, as compared with the large amount of the special damage, is often regarded by the courts as material in deciding the question of notice. So in a case in Illinois,(c) the plaintiff sued for the price due him for building a railroad. The defendant claimed to recoup damages for delay in the construction. It appeared that the defendant had given

(a) 60 N. Y. 487.
(b) Clark *v.* Moore, 3 Mich. 55, 61.
(c) Snell *v.* Cottingham, 72 Ill. 161.

bonds on account of construction, with agreement that interest should be waived for the time the road was completed before July 1st, and this agreement was known to the plaintiff at the time his contract was made. The plaintiff's work was to have been completed six months before the time named in the sub-contract. It was held that the plaintiff should not be charged with the interest which the defendant was obliged to pay from January 1st to the completion of the work. The court laid special stress on two facts: first, that the interest rebated was enormously disproportionate to the contract price of the work; second, that the plaintiff was contracting to build only a part of the whole work. If the case can be supported on the first ground, it must be because the disproportion showed that the contract was not based upon the special circumstances.

§ 160. **But need not be part of the contract.**—In Horne *v.* Midland Ry. Co.,(a) Blackburn, J., went further, and said that in his opinion notice did not change the rule of damages unless it were such as to create a special contract. It is to be observed that if this opinion is sound, it does away at once with the whole doctrine of notice. For if the notice of special circumstances is incorporated into the contract, that is, if the contract provides against the special loss, the loss, if it happens, is not a consequential but a direct result of a breach of the contract, and as such is of course recoverable. The opinion of Lord Blackburn has not been supported by any decided case; and the weight of authority is against it.(b) So a verbal notice has been allowed to change the rule of damages, although the contract was in writing.(c) The

(a) L. R. 8 C. P. 131.

(b) Cory *v.* Thames I. W. & S. B. Co., L. R. 3 Q. B. 181; Baldwin *v.* U. S. T. Co., 45 N. Y. 744 (*semble*).

(c) Hydraulic Eng. Co. *v.* M'Haffie, 4 Q. B. Div. 670.

defendant had failed to carry out a contract to deliver a piece of machinery. The plaintiffs required this machinery in order to carry out a contract with one J. The contract with J., though made subsequently to the contract with the defendant, was the subject of a conversation between the parties before they entered into any agreement. It was held in the Court of Appeals, that the plaintiff could recover the profits he would have derived from his contract with J., and also the expenses to which he had been put in making part of an engine for J., which had been thrown away.

§ 161. **Notice of a sub-contract.**—Where the plaintiff makes the contract in order to fulfil another contract with a stranger, and so informs the defendant, he may recover such damages as the information given would indicate as likely to happen.

In Borries *v.* Hutchinson (a) the plaintiffs bought caustic soda of the defendant, part to be shipped in June, part in July, and the rest in August, and the defendant knew at the time of the sale that the plaintiffs bought it for shipment and resale abroad, but not that it was for Russia, although he learned this also before the end of August. He neglected to deliver any of the soda until September, in which month and in October he delivered a portion. There was then no market for the soda, and the plaintiffs, who had contracted for the resale to one Heitman, in Russia, lost the profit of the resale on what was not delivered, and by reason of the approach of winter in the Baltic, were obliged to pay increased rates of freight and insurance for what was delivered. In this case there was no market value for the caustic soda. It was held that the plaintiff could recover the profits he

(a) 18 C. B. (N. S.) 445, 463.

would have made on his resale to Heitman, and could also recover the increased rates of freight and insurance. Erle, C. J., put the decision as to the profits on the ground that the vendor had notice that the vendee was trying to fulfil an order abroad ; the decision as to freight and insurance on the ground that the plaintiff did the best he could to diminish the loss. " I agree that it is not competent to a purchaser so to deal with goods delivered under such circumstances as to exaggerate the loss ; but if he does all that a man of reasonable skill and care can do to make the damage as small as possible, there is no reason why he should not be recouped to that extent." If he had not done so, the deterioration in value would have been very great. Willes, J., points out that the decision as to the profits of the resale rests on the ground that there was no market where the plaintiff could furnish himself with soda of the same quality. It was further held that the plaintiff could not recover money which he had paid to reimburse Heitman for damages which Heitman had been obliged to pay to a sub-vendee, Heimburger, for failure to perform a contract with him.

Elbinger Actien-Gesellschaft *v.* Armstrong ([a]) was an action for the defendant's breach of a contract to furnish the plaintiffs with 666 sets of wheels and axles. The plaintiffs were under a contract to supply wagons to the Russian Government by a certain date. They informed the defendants that they were under a contract to deliver wagons to the Russian Government under a penalty, but did not state the date of delivery or the amount of the penalty. By reason of the defendant's delay the plaintiffs had to pay £100 on their sub-contract. Although the market price had kept the same, it was held that the plaintiffs could recover substantial damages, and it was

([a]) L. R. 9 Q. B. 473, 479.

said that it would have been proper to instruct the jury, "that the plaintiffs were entitled to such damage as, in their opinion, would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach of that contract, to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary," for, said the court, the direction would not, at all events, have been too unfavorable to the defendants.

The distinction between these cases seems to be that in the former case, the sub-contract by the sub-vendee, Heitman, was not brought to the defendant's notice.

In Hinde *v.* Liddell (a) the defendant contracted to supply the plaintiff with shirtings of a certain quality to fill a contract. The defendant broke his contract, and the plaintiff, being unable to procure shirtings of the same quality in the market, was obliged to fulfil his sub-contract by delivering more valuable shirtings. It was held that he could recover the excess of price.

The leading case on the subject is Grébert-Borgnis *v.* Nugent.(b) The defendant agreed to furnish the plaintiff with goods of a certain sort, not procurable in the market, knowing that the plaintiff required them to fulfil a contract with a French customer, but not knowing the price named in the latter contract. It was held that the plaintiff could recover, in addition to ordinary damages, compensation on account of his enforced breach of the French contract; that the amount recovered by the French customer against the plaintiff in an action on the other contract might be shown, not as a measure of the compensation, but as evidence of what a reasonable

(a) L. R. 10 Q. B. 265. (b) 15 Q. B. Div. 85.

compensation for forcing the plaintiff to break the contract would be.

Brett, M. R., in the course of his opinion (p. 89), said :

"Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must show that the defendant, at the time he made his contract with the plaintiff, knew of the contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such sub-contract was not made known to him at all, the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value. But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable ; and the proper inference, and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract. Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him. . . . . Supposing there was in the sub-contract between myself and my purchaser not only a stipulation that I should pay 4*l.* a ton, but, besides that, I should be liable to a penalty of 5*l.* a day, although that is in the sub-contract, yet if that part of it was not made known to the original vendor, he would not be liable to pay the penalty of 5*l.* a day. It seems to me that the cases establish that the original vendor is to be liable to so much of the sub-contract as was made known to him, but only to that extent."

The Master of the Rolls cited in support of his position Borries *v.* Hutchinson and Elbinger Actien-Gesellschafft *v.* Armstrong.

Bowen, L. J., said (p. 92):

"A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of Hadley *v.* Baxendale. Now, how much of the damages claimed may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract depends in every case upon how much of the real situation of the parties was so disclosed by the purchaser to the vendor at the time the contract was made, as to render it a fair inference of fact that damages of that class were intended to be recouped if they were suffered. . . . . In a case of this sort, where there was no market into which the parties could go and buy against the broken contract, the natural result which must have been contemplated at the time the original contract was made must have been that there would be a liability by the purchaser to his sub-purchaser."

The Lord Justice expressed the opinion that if Borries *v.* Hutchinson is inconsistent with Elbinger Actien-Gesellschafft *v.* Armstrong, it must be overruled.

In Messmore *v.* The N. Y. Shot & Lead Co.(a) it was held that the plaintiff could recover, for the vendor's failure to supply bullets, the profits he would have made on a contract of resale, the defendant having notice of the contract. Mason, J., delivered the opinion of the court. He stated that usually the difference between the market and the contract price determined the measure of damages, because the vendee could go into the market and supply himself. He said the rule, however, was different where notice was given, because in such a case the profits of the resale might be said to be in the contemplation of the parties. He continued (p. 428): "It (the notice) showed that these profits to this plaintiff were in the contemplation of the parties in entering into this

(a) 40 N. Y. 422.

contract, and as the evidence showed such to be the fact, these profits that would have accrued to the plaintiff, had the contract been performed by the defendants, are in no sense speculative or uncertain profits." He pointed out that in this case the plaintiff could not have supplied himself in the market.

§ 162. **Notice of a contemplated resale.**—In Mann *v.* Taylor ([a]) the defendant contracted to deliver to the plaintiff certain goods for the purpose of resale, knowing that certain expenses were necessary in preparation for resale. Upon failure to deliver the goods, the plaintiff was allowed compensation for such expenses.

In Hammond *v.* Bussey ([b]) the defendant sold the plaintiff coal as of a certain quality, knowing he was buying it to resell as coal of that sort. It was not of the quality named, but the difference could be discovered only when the coal was used. The plaintiff, having sold some of the coal, was sued by the purchaser on account of the inferiority of the quality: he gave notice of the suit to the defendant, who declined to defend it. It was held that the plaintiff might include in his damages the damages and costs in the action against him by the purchaser. The court held that the rule as to sub-contracts extended to contracts not made at the time of the original contract, but in the ordinary course of business sure to be made. Lord Esher, M. R., said:

"To my mind it is perfectly clear that, according to a reasonable business view of the reasonably probable course of business, the parties may be supposed to have contemplated, at the time when the contract was made, as the inevitable or at any rate the highly probable result of a breach of it, that there would be a lawsuit between the plaintiffs and their sub-vendees, in which it would be reasonable for the plaintiffs to defend, and in which,

([a]) 78 Ia. 355.

([b]) 20 Q. B. Div. 79, 93, 99.

if it turned out that there was a breach of the warranty, the plaintiffs would lose, and that they would thereby necessarily incur costs. Costs incurred under such circumstances appear to me to fall within the second branch of the rule in Hadley *v.* Baxendale."

Fry, L. J., said:

"There are, I think, four questions which have to be answered in order to see whether these costs come within it. First, what are the damages which actually resulted from the breach of contract? It seems to me that the loss actually sustained by reason of such breach was that of the damages recovered by the sub-vendees in their action against the plaintiffs and the costs of that action. Secondly, was the contract made under any special circumstances, and, if so, what were such circumstances? It appears that it was made by the plaintiffs with the intention of re-selling the coal to steamships visiting Dover in the course of their usual business. Thirdly, what at the time of making the contract was the common knowledge of both parties? The purposes for which the plaintiffs bought the coal were as well known to the defendant as to the plaintiffs themselves. Having thus ascertained the special circumstances under which the contract was made, and the knowledge of the parties with regard to them, we come to the last question, viz., what may the court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach? It seems to me that they must have contemplated, if there was a breach of the contract, that the plaintiffs' sub-vendees would make a claim and bring an action against the plaintiffs to enforce such claim; and further, that the plaintiffs would on such an action being brought behave as reasonable men and would pay without contest if it was unreasonable to defend the action, but would defend the action if it was reasonable to do so. I think all these matters may be reasonably supposed to have been within the contemplation of the parties. That being so, it follows that the costs of a reasonable defence would be in the contemplation of the parties, if they had worked out the question what the damages were which would reasonably be payable upon a breach of contract. Therefore it seems to me that, applying the rule in Hadley *v.* Baxen-

dale to the special circumstances of this case, we arrive at the conclusion that these costs ought to be recovered as damages."

§ 163. **Notice of a sub-contract, but not of the price.**—In Horne *v.* Midland Ry. Co.(a) the plaintiffs were under a contract to supply a quantity of military shoes to H., in London, for the use of the French army, at 4*s.* per pair, an unusually high price. On the day on which the shoes were to be delivered they sent them to the defendants' station at K., in time to be delivered in the usual course of business, in the evening of that day, when they would have been accepted. Notice was given that the plaintiffs had a contract, and unless they were delivered on that day they would be thrown on their hands, but not of the price stated in the contract. The market price was 2*s.* 9*d.* It was held that the plaintiffs could not recover the difference between 4*s.* and 2*s.* 9*d.* per pair. Willes, J., said: "The damages are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract." This decision was affirmed in the Exchequer Chamber.(b) Mellor, J., distinguished France *v.* Gaudet,(c) on the ground that in that case champagne of a similar quality was not procurable in the market, and therefore the resale was the only test of the value of the goods. Kelly, C. B., referred to the fact that the defendant was a common carrier, and bound to accept, even if notice had been given. He continued: "But in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to

(a) L. R. 7 C. P. 583. (b) L. R. 8 C. P. 131. (c) L. R. 6 Q. B. 199.

me any contract to be liable to more than the ordinary amount of damages can be implied from the mere receipt of the goods after such a notice as before mentioned." He then pointed out that there was no notice here of the exceptional nature of the contract and of the unusual loss that would result; that here the defendants would only expect a contract at the market price. Pigott, B., dissented from the decision, saying that the company could decline to carry goods except at the ordinary risks, and if they accepted goods after such a notice, they became liable for the special value. He continued: "Such loss being actually the result of the defendants' breach of contract, why are the plaintiffs not to recover it? It can only be by reason of some artificial rule established by the decisions or some ground of public policy, that makes the measure of damages which may be recovered less than that which is actually sustained." He said that here the consignee had notice and should have made further inquiries.

The decision properly rests upon the same principle that excludes unexpected consequences in general. The defendant knew of the sub-contract of sale, and was prepared to take the risk of it; but no notice had been given that the sub-contract was for an extraordinary price.

On the other hand, where the sub-contract is at the market price, or for a reasonable advance over the contract sued on, and the defendant is notified of the sub-contract, but not of the price, the plaintiff upon default may recover the profit of the sub-contract.(a)

In an action for breach of a contract to deliver steel caps for rails, it appeared that the plaintiffs were under

(a) Illinois C. R.R. Co. *v.* Cobb, 64 Ill. 128; Cobb *v.* Illinois C. R.R. Co., 38 Ia. 601. But *contra*, Harper *v.* Miller, 27 Ind. 277 (*semble*).

a contract to deliver a quantity of steel-capped rails to the Hudson River Railroad Company at $315 per ton, and the defendant was informed of the contract, but not of the price. This contract they could not perform, owing to the defendant's failure. There was no market value for either steel caps or steel-capped rails. It was held that the plaintiff could recover the profits of his contract with the Hudson River Railroad Company. Church, C. J., said that the damages recoverable in breach of contract, were such "as ordinarily and naturally flow from the non-performance." He approved of the principle of Hadley *v.* Baxendale, that the damages must be such as were in the contemplation of the parties. As to the damages in this case, he said that the plaintiff's recovery could not be objected to on the ground that the plaintiff had not suffered loss, for he had lost his sub-contract; nor on the ground of uncertainty, since the damages were fixed and definite. As to the notice of the object of the contract, he said: "If the article is one which has a market-price, although the sub-contract is contemplated, there is some reason for only imputing to the vendor the contemplation of a sub-contract at that price, and that he should not be held for extravagant or exceptional damages provided for in the sub-contract." [a]

The same rule applies where the defendant has no actual notice of the sub-contract, but it is made in the regular course of trade, of which he was cognizant [b]

§ 164. **Notice of a special use for goods.**—In a case which immediately followed Hadley *v.* Baxendale, the defendant had contracted to build a ship, which was to be

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[a] Booth *v.* Spuyten Duyvil R. M. Co., 60 N. Y. 487.
[b] McHose *v.* Fulmer, 73 Pa. 365.

delivered to the plaintiff on the 1st of August, 1854. It was not delivered till March, 1855. The vessel was intended by the plaintiffs—and from the nature of her fittings the defendants must have known the fact—for a passenger ship in the Australian trade. Evidence was given that freights to Australia were very high in July, August, and September, but fell in October, and continued low till May, when the vessel sailed; and that, had she been delivered on the day named, she could have earned £2,750 more than she did. On the other hand, it was shown that the plaintiffs would have extended the time for delivery till the first of October, if the defendants would have bound themselves to that day under a demurrage (which, however, was refused), and that they had stated as their reason for wishing to have the ship then, "that after that time the days would be shortening so fast that they would be seriously inconvenienced and prejudiced in fitting the vessel out." The judge charged in the words of Hadley *v.* Baxendale, and the jury found a verdict of £2,750. An attempt was made to set aside the verdict for excess of damages, on the ground that if the plaintiff's offer had been complied with, the loss of freight would have been suffered, and that the damages should be measured rather by the species of loss which they had themselves pointed out, than by that which they afterwards set up. The rule was refused.[1]

In Schulze *v.* Great Eastern Ry. Co.([a]) the plaintiff sued the defendant, a common carrier, for failure to deliver a package containing samples. The defendant had notice of the contents of the package. The plaintiff hav-

[1] Fletcher *v.* Tayleur, 17 C. B. 21.

([a]) 19 Q. B. Div. 30.

ing lost a season's trade by the non-delivery of the samples was allowed to recover damages on that account. In Fox *v.* Boston & M. R.R. Co.(a) the plaintiff made a special arrangement with the defendant, a common carrier, with a view to the mildness of the weather, to deliver apples which were shipped to a connecting railroad at a certain time. The defendant delayed the delivery, and as a consequence the apples were frozen while in transit on the connecting line. The defendant was held liable for the loss of the apples.

In Smeed *v.* Foord (b) the defendant had contracted to deliver a threshing machine to a farmer within three weeks, knowing that it was the plaintiff's practice to thresh his wheat in the field, and send it off at once to the market. The defendant failed to deliver it in time. The farmer made some attempts to hire another machine, but not any very active ones, as he was continually receiving letters from the defendant leading him to expect the arrival of the machine. He stacked the wheat, but being unable to hire thatchers, it was injured by the rain. On this account it became necessary to kiln-dry it. The plaintiff claimed damages: First, for the expense of stacking and drying the wheat, and for loss arising from its deterioration in value by the rain. Second, for the fall in the market value between the time when it would have been ready and when it actually was. It was held that the parties must reasonably have contemplated injury by the weather if the wheat was not threshed at once, and therefore the first claim was sustained; but the court refused to allow damages for a fall in the market value, holding that that was not within the contemplation of the parties.

(a) 148 Mass. 220.

(b) 1 E. & E. 602.

In Simpson *v.* London & N. W. Ry. Co.(a) the plaintiff had been exhibiting his wares at a show at B. He usually sold some, but his chief object was to exhibit them as an advertisement to procure custom. He delivered them to the defendant to take to *the show ground* at N., and indorsed on the consignment note that they must be there by a certain day. They did not arrive there till the show was over. It was held that the plaintiffs could recover damages which had been given for either loss of profit or of time. It was said that the defendant had sufficient notice of the special circumstances, and therefore it must be deemed to have been in the contemplation of the parties that the damage would include whatever loss the plaintiff suffered by missing the show.(b) In Hamilton *v.* Western N. C. R.R. Co.(c) the defendant company failed to furnish freight cars to the plaintiff on a certain day, according to agreement. The company had notice that by shipment of his goods on that day the plaintiff could get the advantage of a favorable market. The company was held liable for the loss of the favorable market. The defendant contracted with the plaintiff, a butcher, to furnish the ice required for his ice-box, knowing the use which the plaintiff had for it. In an action for failure to supply the ice, it was held that the plaintiff could recover compensation for meat spoiled for lack of ice.(d)

§ 165. **Notice of use of machinery.**—In British Columbia S. M. Co. *v.* Nettleship(e) it appeared that several cases containing machinery intended for the erection

(a) 1 Q. B. D. 274.

(b) *Acc.* Richardson *v.* Chynoweth, 26 Wis. 656.

(c) 96 N. C. 398; *acc.* Deming *v.* Grand T. R.R. Co., 48 N. H. 455.

(d) Hammer *v.* Schoenfelder, 47 Wis. 455.

(e) L. R. 3 C. P. 499.

of a mill at Vancouver's Island, were delivered to the defendant's servants at Glasgow for transportation to that place, and the defendant knew generally of what the shipment consisted, but did not know for what purpose it was intended. The measure of damages for the loss of one of the cases was held to be the cost of replacing the missing articles at the Island, the plaintiff having been obliged to send to England for it, as none similar could be procured at Vancouver's Island. It was further held that the plaintiff could recover interest on the amount for the delay in sending to England, but not profits he might have made if the mill had been erected. The rule of Hadley *v.* Baxendale was distinctly affirmed on the ground that some limitation must be put on a defendant's liability, and that seemed the most proper limitation. Willes, J., also pointed out that the damages claimed here were speculative in the extreme. As to the effect of notice of the object of the contract, he said (p. 509): "To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

In Hydraulic E. Co. *v.* M'Haffie ([a]) it appeared that the defendant had failed to carry out a contract to deliver a piece of machinery. The plaintiffs required this machinery in order to carry out a contract with one J. The contract with J., though made subsequently to the contract with the defendant, was the subject of a conversation between the parties before they entered into any agreement. It was held in the Court of Appeal,

([a]) 4 Q. B. Div. 670.

that the plaintiff could recover the profits he would have derived from his contract with J., and also the expenses to which he had been put in making part of an engine for J., which had been thrown away.

§ 166. **Notice of a special use for material.**—In Gee *v.* Lancashire & Yorkshire Ry. Co.,(a) the plaintiffs, who were cotton spinners, having rented a new mill which was in readiness to begin working, and engaged a number of hands for it, caused to be delivered to the defendants, to be carried from Liverpool to Oldham, some bales of cotton, which were, through the negligence of the carriers, delayed in the delivery for some days beyond the usual time. In consequence of the delay, the plaintiffs having no other cotton to work with, the mill was kept idle, and the work-people were unemployed. The necessity of cotton to enable the plaintiff to work this mill was not communicated to the defendants at the time of its delivery for freight, but was so communicated immediately on its non-arrival at the proper time, after which there was still an unreasonable delay in the delivery on the part of the carrier. The county judge had charged that the plaintiff could recover as legal damage such loss as arose from the stoppage of the mill, and that the jury should give the amount of wages and other actual loss. This was held to be error. The court said that the stoppage of the mill was not a necessary consequence of the non-delivery of the cotton, for the fact that the plaintiff had no other cotton was the more immediate cause. Pollock, C. B., thought that the company could not be held liable, unless it had special notice of the object of the contract at the time of sending the goods. Bramwell, B., pointed out that the decision was not to the effect that the plaintiff could not, in any event, recover the

(a) 6 H. & N. 211.

wages and the loss of profit. He said that they could, if it were the custom for mills to have so little supply of cotton on hand, and that therefore it should have been left to the jury to say whether the stoppage was the natural consequence of the non-delivery.

In Jones *v.* National Printing Co.([a]) the defendant contracted to furnish paper of a peculiar size at a certain day. The defendant was told that if the paper was not furnished the presses would stand idle. As a matter of fact the plaintiff was under contract with a third party to do certain printing, for which the paper ordered of the defendant was required; but the defendant was not notified of the latter contract. The delivery of the paper was delayed, and the plaintiff was required to do extra night presswork in order to fulfil his contract for printing. It was held that the plaintiff might recover compensation for his presses remaining idle during the period of delay, but not for the expense of the night presswork. In Vickery *v.* McCormick ([b]) the defendant agreed to deliver timber to be used for special work, and had notice that delay in delivery would stop the work. In an action for delay in delivery, it was held that the plaintiff might recover compensation for his loss through stoppage of the work.

§ 167. **Notice of special use for premises.**—The rental value of a building will be the measure of damages in an action for delay in delivering possession; but if the contract be to furnish a building for a particular purpose, the rental value of a building used in that way will be the measure of damages.([c]) Townsend *v.* Nickerson Wharf Co.([d]) was an action by a lessee against his lessor for

([a]) 13 Daly 92.

([b]) 117 Ind. 594.

([c]) Hexter *v.* Knox, 63 N. Y. 561.

([d]) 117 Mass. 501.

failure to deliver all the demised premises. The plaintiff had entered upon part of the premises, and had paid the rent in full for the whole term. It was held that the plaintiff could only recover the diminished value of the lease from its not giving him all the premises; that he could not recover for expenses put on the building, nor for injury to his business on account of the fact that the lease was only of use to him if he had the whole building. The court said, however, that if the lessor had special notice of the lessee's object in hiring the premises, the plaintiff could have recovered the damage to his business. The defendant failed to perform his contract to build a building for the plaintiff to store his corn in. The plaintiff was allowed compensation for loss of his corn, caused by lack of shelter for it.[a]

§ 168. Notice of special use for funds.—In Grindle *v.* Eastern Express Co.[b] the defendant, a common carrier, neglected to deliver in time some money which was to pay the premium on an endowment policy. The policy consequently lapsed. The defendant had notice of the object for which the money was intended. It was held that the plaintiff could recover the value of the policy when it lapsed, for although the loss of the money would generally only have made the defendant liable for that, yet where he was "reasonably informed" of the purpose, his liability would be increased.

§ 169. Notice of special use for information.—In Sanders *v.* Stuart[c] the defendant's business was to collect telegraphic messages for transmission to America. The plaintiff gave the defendant a message in cipher, which he negligently failed to send. The message was an order

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[a] Haven *v.* Wakefield, 39 Ill. 509.
[b] 67 Me. 317.
[c] 1 C. P. D. 326.

for goods on which the plaintiff would have made a commission. It was held that the plaintiff could not recover the commission; he could only recover nominal damages. Coleridge, C. J., said that there were no damages which were in the contemplation of the parties. He continued: "And for the same reason, viz.: the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiff), the first portion of the rule applies also," for, he said, there were no damages arising naturally from the breach.

In Baldwin *v.* The United States Telegraph Co.([a]) the plaintiff had received an order by telegram for his interest in an oil well. He at once telegraphed, by defendant's and a connecting company, to an agent, inquiring how much the well was producing, telling the operator of the connecting company that he would sell his interest unless he received an answer promptly. The delivery of the message was delayed by defendant's carelessness. The plaintiff accordingly sold his interest. Very soon afterward he received a message from his agent, informing him that the interest was much more valuable than the price for which he had sold it, and offering him $1,200 more than he had received from the sale. The market price was found to be even greater than this. On the trial he recovered $1,200 damages, but on appeal this was held to be error. Allen, J., delivering the opinion of the court, adopted the rule of Hadley *v.* Baxendale. As to this message, he said it indicated nothing which would lead parties to expect any special or peculiar loss. "Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for

([a]) 45 N. Y. 744.

how avoided 3 Sedg. D § 1261.

the non-performance of contracts, ... it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract in the minds of the parties." He suggested [a] that it was doubtful whether in any view such damages could be allowed as a result of the non-delivery, saying, "They are quite too remote, and depend upon too many contingencies"; that if the message had been received, the agent might not have answered; if he had, it was doubtful what he would have answered; the answer might not have been received. Western Union Tel. Co. *v.* Graham [b] was an action for failure to deliver a telegram instructing the plaintiff's correspondents in Nebraska City to "ship oil as soon as possible at the very best rates you can." It was held that the plaintiff could recover what he paid for the transmission of the message and the increased price of freight on the oil, but not profits that he might have made on the oil if the message had been delivered and the oil sent in time. It would be more in accordance with common-law doctrines to give damages in such a case, for the natural consequence of the failure to deliver the message is that the plaintiff has not the oil at the market price current when the message should have been received. Damages were given in such a case in Maine [c] in an action for failure to send a message accepting an offer to sell the

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[a] P. 752.

[b] 1 Col. 230.

[c] True *v.* International T. Co., 60 Me. 9.

plaintiffs some corn. The message was, "Ship cargo named at ninety if you can secure freight at ten." It was held that the measure of damages was the difference between the price named and that which the plaintiff would have been obliged to pay at the same place, in order by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise.

CHAPTER V.

CERTAIN AND UNCERTAIN DAMAGES.

§ 170. Amount of loss must be shown with reasonable certainty.
171. Best proof possible must be given.
172. Prospective loss—Personal injury.
173. Gain prevented—Profits.
174. Allowance of profits, how regulated.
175. Early cases.
176. Profits recoverable if proximate, natural, and certain.
177. General rule.
178. Cases of entire loss do not fall within the rule.
179. Gain expected from the use of money.
180. Loss through injury to capacity to labor.
181. Personal injury resulting in loss of business.
182. Profits of an established business.
183. Of a new business.
184. Damages for obstructing the use of land.
185. Failure to give possession of real estate.
§ 186. Failure to put a structure on land.
187. Loss of use of a road or bridge.
188. Damages for wrongful eviction.
189. Loss of the use of business premises.
190. Injury to machinery.
191. Injury to crop.
192. Profits of a contract.
193. Contracts for a share in the profits of a business.
194. Collateral profits.
195. Loss of use of personal property.
196. Loss of use of a vessel.
197. Profits expected from the sale of goods.
198. Profits included in the market price.
199. Profits expected from the manufacture of raw material.
200. From competition or speculation.

§ 170. **Amount of loss must be shown with reasonable certainty.**—A party who claims compensation for an injury done him must show, as part of his case, not only that he has suffered a loss on account of the injury, but also what is the amount of the loss; and the burden of proving both these things is upon him. He is to show, with that reasonable certainty required by the law, just

the amount of damages that should be allowed him as compensation: no damages can be recovered for an uncertain loss.

"It must not be supposed that under the principle of Hadley *v.* Baxendale mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty."([a])

Absolute certainty is not required. The true rule on the subject is announced by the Supreme Court of Michigan in a well-reasoned case.([b]) "Shall the injured party . . . . be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would be thus attained; but it would be the certainty of injustice. . . . . Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a

([a]) Depue, J., in Wolcott *v.* Mount, 36 N. J. L. 262, 271.

([b]) Christiancy, J., in Allison *v.* Chandler, 11 Mich. 542, 555.

part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." (a) In Satchwell *v.* Williams,(b) Phelps, J., said that it was no objection that the defendant could only state his damage proximately, though it would be to show that his evidence was so vague and uncertain that the court could not deduce from it, that the defendant had sustained any particular amount of damage.

§ 171. **Best proof possible must be given.**—But on the other hand where the amount of damage is susceptible of proof, proof must be offered. In Duke *v.* Missouri P. Ry. Co.,(c) an action for personal injuries, nothing had been paid by the plaintiff on account of medical expenses, and no evidence was offered as to the value of the services rendered. The court said: "When such damages are susceptible of proof with approximate accuracy, and may be measured with some degree of certainty, they should not be left to the guess of the jury, even in actions *ex delicto*." In a similar case in New York,(d) where the plaintiff failed to prove the value of the time lost, the court said: "Where loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent or from which it can be inferred, the jury can allow nominal damages only. For pain and suffering or injuries to the feelings

(a) See *acc.* East Tennessee, V. & G. R.R. Co. *v.* Staub, 7 Lea 397.
(b) 40 Conn. 371.
(c) 99 Mo. 347, 351.
(d) Leeds *v.* Metropolitan G. L. Co., 90 N. Y. 26; Danforth and Tracy, JJ., diss.

there can be no measure of compensation save the arbitrary judgment of a jury. But that is a rule of necessity. Where actual pecuniary damages are sought some evidence must be given showing their existence and extent. If that is not done the jury cannot indulge in an arbitrary estimate of their own." But in Feeney *v.* Long Island R.R. Co.,[a] where the number of times a physician had visited the plaintiff was shown, but not the value of his services, it was held that the jury must give at least a nominal amount on account of medical expenses, and if no instruction was asked by the defendant on the subject the latter could not object to a reasonable amount found by the jury on account of medical expenses.

§ 172. **Prospective loss—Personal injury.**—Where the injury is in the nature of a loss inflicted, the amount may generally be proved without any uncertainty. The chief difficulty experienced is in cases of prospective loss. When the plaintiff claims compensation for consequences of the injury which he has not yet experienced, he must prove with reasonable certainty that such consequences are to happen;[b] and compensation is not to be given where there is a mere conjectural probability of future loss.[c] The jury has no right to allow damages for mere possibilities.[d]

"Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably

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[a] 116 N. Y. 375.

[b] De Costa *v.* Massachusetts F. W. & M. Co., 17 Cal. 613; Fry *v.* Dubuque & S. Ry. Co., 45 Ia. 416; Lincoln *v.* Saratoga & S. R.R. Co., 23 Wend. 425; Staal *v.* Grand St. & N. R.R. Co., 107 N. Y. 625.

[c] Chicago C. Ry. Co. *v.* Henry, 62 Ill. 142.

[d] Fry *v.* Dubuque & S. Ry. Co., 45 Ia. 416.

certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining the damages. . . . . To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring, as amounts to a reasonable certainty that they will result from the original injury."[a]

So in an action on the case against a railroad company, for injuries resulting from a collision, the plaintiff proved that his leg was broken, and that the oblique character of the fracture rendered it very probable that a second fracture would take place; but this the Supreme Court of New York held too remote. The present and probable future condition of the limb were proper matters for inquiry; but the consequences of a hypothetical second fracture were obviously beyond the range of it, and calculated to draw the minds of the jury into fanciful conjectures.[b]

This "reasonable certainty" does not mean absolute certainty, but reasonable probability.[c] Where no evidence appeared as to the circumstances and condition in life of the plaintiff, his earning power, skill or capacity, no damages could be awarded for future pecuniary loss.[d] But the fact and amount of future loss is a question for the jury,[e] which has discretion in estimating it.[f] The value of loss of future support and earning capacity can be estimated in a statutory action

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[a] Rapallo, J., in Strohm *v.* New York, L. E. & W. R.R. Co., 96 N. Y. 305, 306.

[b] Lincoln *v.* Saratoga & S. R.R. Co., 23 Wend. 425.

[c] Griswold *v.* New York C. & H. R. R.R. Co., 115 N. Y. 61 (explaining Strohm *v.* Ry. Co.); Feeney *v.* Long Island R.R. Co., 116 N. Y. 375.

[d] Staal *v.* Grand St. & N. R.R. Co., 107 N. Y. 627.

[e] Colby *v.* Wiscasset, 61 Me. 304.

[f] Union P. Ry. Co. *v.* Dunden, 37 Kas. 1.

for causing death of a husband,[a] parent,[b] or child.[c] It is, however, held in actions for defamation that prospective damages for injury to reputation cannot be recovered,[d] for the verdict heals the reputation.[e]

§ 173. **Gain prevented—Profits.**—Where an injured party claims compensation for gain prevented, the amount of loss is always to some extent conjectural; for there is no way of proving that what might have been, would have been. Thus, when the claim is made for compensation for a deprivation of property, it may be that if the property had remained in the owner's control it would have brought no gain. When the compensation claimed is for loss of earnings through a personal injury, it might have been impossible for the injured party, if uninjured, to earn anything. The question of certainty of loss, therefore, arises in all cases of gain prevented (the *lucrum cessans* of the civil law). The word *profits* is often loosely used in the sense of gain prevented; and this use of the word has caused confusion in the cases. Much would be gained by restricting the use of the word to the gains of business ventures; but so firmly fixed is the looser use that both meanings are to be borne in mind. In speaking of profits as damages a court may mean either the wages a man could earn, the rent or value of use of property, the advantages of a contract, or the true profits of a business.

§ 174. **Allowance of profits, how regulated.**—The allowance of profits, when not excluded as unnatural or re-

(a) Lawson *v.* Chicago, St. P., M. & O. Ry. Co., 64 Wis. 447.

(b) Eames *v.* Brattleboro, 54 Vt. 471.

(c) Houghkirk *v.* Delaware & H. C. Co., 92 N. Y. 219; Hoppe *v.* Chicago, M. & St. P. Ry. Co., 61 Wis. 357; Johnson *v.* Chicago & N. W. Ry. Co., 64 Wis. 425.

(d) Bradley *v.* Cramer, 66 Wis. 297.

(e) Halstead *v.* Nelson, 24 Hun 395.

x Analogy to Interest in certain instances. See post, § 321.

mote, is wholly a question of the certainty of proof. Wherever there is an interference with, or withholding of property, or breach of contract, or commission of a tort, the gain prevented, if provable, may be recovered. As a general rule, the *expected* profits of a business cannot be proved and therefore cannot be recovered. They might have been made, and they might not. Instead of profits there might have been losses. Hence in such cases the measure of damages is, not the expected profits, but the average value of the use of the land, property, or business, and to ascertain this, evidence of actual past profits must be admissible. This bears a close analogy to the ordinary rule with regard to money. Expected profits from the use of money can never be recovered. The measure of damages is the average value of the use, or in other words, interest. Going a step further, we shall find that whenever expected profits become capable of certain proof, then they can be recovered.

Thus in all actions for breach of contract in which the value of a sub-contract is allowed, and in all actions against carriers for the loss of specific personal property when the market value at the time and place of destination is given, and in all actions by the vendee for failure to deliver property sold, where the difference between price and market value is allowed, the plaintiff really recovers the specific profit lost, or gain prevented. In cases in which the plaintiff does not recover gain prevented or profits, or the value of the use, he should be allowed at all events the expenses to which he has been put by the tort of breach of contract.

§ 175. **Early cases.**—* The early cases, in both the English and American courts, generally concurred in denying profits as any part of the damages to be compensated, and that, whether in cases of contract or of tort. So in a

case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage, and held this general language: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness, in point of time and value, which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjecture, and not upon facts. Such a rule, therefore, has been rejected by courts of law in ordinary cases; and instead of deciding upon the gains or losses of parties in particular cases, an uniform interest has been applied as the measure of damages for the detention of property."[1]

So where a privateer had improperly detained a merchant vessel, and taken out her crew, in consequence of which she was lost,—it was held by the Supreme Court of the United States, that the owners of the privateer were liable only for the value of the vessel, the prime cost of the cargo, with all charges, and the premium of insurance.[2]

So in the same court, where a privateer had improperly boarded a vessel and taken away her papers, in consequence of which her voyage was broken up, it was held that the owners were not liable for the loss of profits on

[1] The Schooner Lively, 1 Gall. 315, 325.

[2] The Anna Maria, 2 Wheat. 327.

the intended voyage, nor for loss by deterioration of the cargo which was not caused by the improper conduct of the captors, and it was said: "The prime cost or value of the property lost at the time of the loss, and, in case of injury, the diminution in value by reason of the injury, with interest upon such valuation, afford the true measure of damages. This rule may not secure a complete indemnity for all possible injuries; but it has certainly a general applicability to recommend it, and in almost all cases will give a fair and just recompense." The suit was against the owners, who were constructively liable; and it was admitted "that if it had been against the original wrong-doers, it might be proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to lawless misconduct."[1] And in a similar case,[2] the same principle was applied to a claim for damages for loss of a market.

So in Massachusetts, in an action of trespass against a deputy sheriff, for taking a schooner of the plaintiff under an attachment against a third party, there being some evidence that she was preparing for a voyage, and there being no malice on the part of the defendant, the jury were instructed to estimate her value at the time of taking, and "the additional damage sustained, if any." But it was held by the Supreme Court, that this would not justify the jury in assessing damages for the breaking up of the voyage.[3]

So in a case of collision between vessels, it has been held that the owner of the injured vessel cannot recover for profits on the voyage broken up by the accident. In such a case the Supreme Court of the United States

[1] The Amiable Nancy, 3 Wheat. 546.
[2] La Amistad de Rues, 5 Wheat. 385.
[3] Boyd *v.* Brown, 17 Pick. 453.

said: "It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party *at the time and place of injury* that is the measure of damages."[1] **

These cases were at one time cited as of general authority in cases involving the allowance of profits. But they probably should not be so considered. With the exception of the Massachusetts case, where profits were properly disallowed as conjectural, they are cases where a voyage was interrupted, and the court refused to allow expected profits upon the cargo. The loss having occurred on the high seas, the value of the cargo at that place was taken; and as the most certain basis of value, the prime cost was shown, and the freight and charges added to it.(a) Moreover, at that time every mercantile voyage was more or less a speculative venture, and hence profits were as a matter of fact conjectural, where through the introduction of steam and the telegraph, they have now become almost a matter of certainty. The preceding cases are therefore not to be regarded as authorities upon the allowance of profits generally.

[1] Smith *v.* Condry, 1 How. 28; *acc.* Minor *v.* Steamboat Picayune No. 2, 13 La. Ann. 564. In the original text of this work, the author said of these cases: "It may well be doubted whether the language of some of the earlier American cases which I have cited has not pushed the rule beyond the true line. The analogies of the law have certainly not been regarded. If on a contract to deliver goods at a distant point, their value at the place of delivery is the true criterion; if on a contract for the sale of chattels, the market price on the day fixed for delivery is the true measure of damage, it is difficult to assign a reason why the same rule should not be applied to the breaking up of a voyage actually commenced, nor why the victim of an illegal capture should be limited to the prime cost of his cargo."

(a) See the chapters on Insurance and Torts in Admiralty.

§ 176. **Profits recoverable if proximate, natural, and certain.**—The plaintiff, then, may in all proper cases show a gain prevented as a ground for compensation. It must, of course, as has been seen in the last chapter, be a natural and proximate consequence of the injury; it must also, as will be seen in this chapter, be a certain consequence of the injury. But if a plaintiff is not allowed to recover compensation for a gain prevented, it must be either because the failure to realize the gain is too remote and unlooked-for a consequence of the injury, or because it is uncertain whether the gain would have been realized; and not because the gain was in the nature of an expected profit.

In the leading case on the subject,[a] Selden, J., said of the supposed rule that profits could not be a basis for recovery:

"It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well-established rule of the common law, that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default, are recoverable; those which are speculative and contingent are not."

He cited, as instances of profits being allowed, cases where a common carrier or a vendor fails to deliver goods, in which case their market value at the place of delivery determines the damages, though that is an allowance of profits. He again said (p. 492):

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[a] Griffin *v.* Colver, 16 N. Y. 489, 491.

"Indeed, it is clear that whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages."

And a few pages later (p. 494):

"The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

In Brigham *v.* Carlisle (a) the court said: "Profits are not excluded from recovery because they are *profits;* but, when excluded, it is on the ground that there are no *criteria* by which to estimate the amount with the certainty on which the adjudications of courts, and the findings of juries, should be based."

§ 177. **General rule.**—The general rule is, then, that a plaintiff may recover compensation for any gain which he can make it appear with reasonable certainty the defendant's wrongful act prevented him from acquiring; subject, of course, to the general principles as to remoteness, compensation, etc., already stated. His compensation will be measured by the most liberal scale which he can show to be a proper one. Damages for interruption of the business of a manufacturer, for instance, may be measured either by the rental value of the property kept unproductive, or by profits of manufacture lost if the plaintiff can show that they would have been greater than the rental value. The questions that arise in the cases

(a) 78 Ala. 243, 249, per Clopton, J.

are therefore questions of sufficiency of proof, and it is to be expected that the courts will not in all cases agree in their interpretation of facts; but the decisions show, under the circumstances, a surprising degree of harmony.

§ 178. Cases of entire loss do not fall within the rule.—It is important to observe that actions brought for the immediate destruction of property do not involve any question of gain prevented. If compensation is asked for destruction, that is, for the whole value of the property, it is upon the theory that the plaintiff's entire interest in the property ceased at the time of the injury, and was replaced by a right to have the value of the property in money. Since, therefore, the plaintiff no longer has title to the property, he can no longer claim that he might make a future gain from it; and his recovery is limited to the value of the property at the time and place of destruction, with interest.[a] If the injury does not extinguish the plaintiff's title, he has a right to compensation for the loss of any use he might rightfully make of the property, subject to the other general principles of the law of damages. The probable aggregate value of such uses, that is, the gain prevented, is therefore a subject for compensation only when the injury leaves the title to the thing injured in the plaintiff.

A misapprehension of the true distinction has led to a few decisions that must be pointed out as unsound. Thus, in an action on a contract to build a steamboat, where the breach was delay in delivering the vessel, the court allowed interest on the value of the vessel at the time and place it should have been delivered, from that time until the delivery actually took place.[b] Where through a defect a boiler manufactured by the defendant

[a] McKnight *v.* Ratcliff, 44 Pa. 156; Erie C. I. W. *v.* Barber, 106 Pa. 125.
[b] Taylor *v.* Maguire, 12 Mo. 313.

exploded and injured the plaintiff's mill, it was held that interest on the money expended in repairs (that is, on the *loss sustained*) was all that could be recovered on account of gains prevented.(a)

An example of the proper application of this principle is found in a Wisconsin case. A machine was destroyed in transit. The owner was allowed to recover the value of the machine; but no compensation for being out of the use of it, which he would have had if the action had been for delay in delivery.(b) So where the plaintiff's horse was drowned in consequence of a collision of canal boats, it was held wrong to allow, besides the value of the horse and interest on that value, the expense of hiring another horse to tow the plaintiff's boat to its place of destination.(c) But although in this class of actions the value of property destroyed, with interest for the time the owner was deprived of it, will compensate him for the loss if no special or extraordinary damage occurred, yet if the injury not only caused a loss of property, but also other proximate loss, further compensation should be given to that extent.

§ 179. **Gain expected from the use of money.**—Where an injury consists of a deprivation of money, the compensation established by the business practice of many generations is the current rate of interest; and such is the measure of damages adopted by the law. The profits which might have been made by the use of the money are too conjectural to be considered.

In an action for the non-payment of money, in which the plaintiffs claimed damages for profits they expected

(a) Erie C. I. W. *v.* Barber, 102 Pa. 156; but on a later consideration of the same case, damages for loss of use were allowed; 106 Pa. 125.

(b) Thomas B. & W. M. Co. *v.* Wabash, St. L. & P. Ry. Co., 62 Wis. 642.

(c) Edwards *v.* Beebe, 48 Barb. 106.

to realize from the use of the money, the Supreme Court of Massachusetts said : (a) "In the use of money, instead of realizing great profits, they [the plaintiffs] might have encountered difficulties and sustained injuries unforeseen at the time, and have suffered, like thousands of others. Theirs is not a loss, in the just sense of the term, but the deprivation of an opportunity for making money, which might have proved beneficial, or might have been ruinous ; and it is of that uncertain character, which is not to be weighed in the even balances of the law, nor to be ascertained by well-established rules of computation among merchants."

The principles governing the allowance of interest as damages for non-payment of money will be considered later. (b)

§ 180. Loss through injury to capacity to labor.—When a person is so injured as to interrupt his earnings, he is entitled to recover compensation for his loss of time ; (c)

(a) Greene *v.* Goddard, 9 Met. 212, 232, per Hubbard, J. (b) Chapter X.

(c) Phillips *v.* Southwestern Ry. Co., 4 Q. B. D. 406 ; Wade *v.* Leroy, 20 How. 34 ; Carpenter *v.* Mexican N. R.R. Co., 39 Fed. Rep. 315 ; South & N. A. R.R. Co. *v.* McLendon, 63 Ala. 266 ; Larmon *v.* District, 16 D. C. (5 Mackey) 330 ; Pierce *v.* Millay, 44 Ill. 189 ; Chicago & A. R.R. Co. *v.* Wilson, 63 Ill. 167 ; Chicago *v.* Jones, 66 Ill. 349 ; Chicago *v.* Langlass, 66 Ill. 361 ; Chicago *v.* Elzeman, 71 Ill. 131 ; Sheridan *v.* Hibbard, 119 Ill. 307 ; Joliet *v.* Conway, 119 Ill. 489 ; Indianapolis *v.* Gaston, 58 Ind. 224 ; McKinley *v.* Chicago & N. W. Ry. Co., 44 Ia. 314 ; Stafford *v.* Oskaloosa, 64 Ia. 251 ; Tefft *v.* Wilcox, 6 Kas. 46 ; Kansas P. Ry. Co. *v.* Pointer, 9 Kas. 620 ; Missouri, K. & T. Ry. Co. *v.* Weaver, 16 Kas. 456 ; Kentucky C. R.R. Co. *v.* Ackley, 87 Ky. 278 ; Rutherford *v.* Shreveport & H. R.R. Co., 41 La. Ann. 793 ; Jordan *v.* Middlesex R.R. Co., 138 Mass. 425 ; Memphis & C. R.R. Co. *v.* Whitfield, 44 Miss. 466 ; Stephens *v.* Hannibal & S. J. R.R. Co., 96 Mo. 207 ; Cohen *v.* Eureka & P. R.R. Co., 14 Nev. 376 ; Sheehan *v.* Edgar, 58 N. Y. 631 ; Clifford *v.* Dam, 44 N. Y. Super. Ct. 391 ; Brignoli *v.* Chicago & G. E. Ry. Co., 4 Daly 182 ; Wallace *v.* Western N. C. R.R. Co., 104 N. C. 442 ; Oliver *v.* Northern P. T. Co., 3 Ore. 84 ; Pennsylvania & O. C. Co. *v.* Graham, 63 Pa. 290 ; Scott *v.* Montgomery, 95 Pa. 444 ; Lake Shore & M. S. Ry. Co. *v.* Frantz, 127 Pa. 297 ; Houston & T. C. Ry. Co. *v.* Boehm, 57 Tex. 152 ; Goodno *v.* Oshkosh, 28 Wis. 300.

that is, for the income which he would have received from his labor during the time lost. The safest way of estimating the loss, adopted in ordinary cases, is to give him the market value of his labor; that is, the average earnings of such a person expressed in wages or salary. If the plaintiff is an ordinary workman, whose labor has an established value in the market, he may recover for loss of opportunity to labor the amount a workman in his line of employment would have received.[a] So in a suit for freedom a negro has been held entitled to recover damages in the nature of hire for the period of the restraint.[b]

In a very large class of cases the earnings of the injured party have depended entirely on his individual abilities, as in the case of professional men and teachers, and travelling salesmen who are paid by a percentage on their sales. In the case of most professional men, there can be no way of fixing a general scale of remuneration. The exclusive services of such men cannot be measured by any pecuniary scale common to a whole class. The most trustworthy basis of damages in such a case is the amount which the injured party has earned in the past. This is, however, only evidence, from which the jury will be enabled to say what the services of such a man as the plaintiff are worth, and the jury should distinctly understand that it is not to be taken as the necessary and legal measure of damages.[c] In an action for in-

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[a] Alabama G. S. R.R. Co. *v.* Yarbrough, 83 Ala. 238; Bridger *v.* Asheville & S. R.R. Co., 27 S. C. 456.

[b] Moore *v.* Minerva, 17 Tex. 20.

[c] We give a few examples—*Actor:* Ware *v.* Welch, 32 Mich. 77. *Architect:* New Jersey Ex. Co. *v.* Nichols, 33 N. J. L. 434. *Clergyman:* Parshall *v.* M. & St. L. Ry. Co., 35 Fed. Rep. 649. *Dentist:* Nash *v.* Sharpe, 19 Hun 365. *Lawyer:* Walker *v.* Erie Ry. Co., 63 Barb. 260. *Midwife:* Luck *v.* Ripon, 52 Wis. 196. *Music teacher:* Baker *v.* Manh. Ry. Co., 54

jury by collision,(a) it was held that evidence was admissible that the plaintiff's business was dealing in land, and also of the value of his business and the profits arising from it. The court below had charged that the plaintiff could recover profits which might reasonably be anticipated, but if the business was uncertain and speculative, and not attended with any reasonable certainty of profits, that none could be recovered. This charge was approved on appeal.

Since the recovery in this case is measured not by the value of any contract or contracts lost, but by the value of the services of such a person as the plaintiff, it is not material whether or not the plaintiff is entitled, as a matter of law, to such payment. The question is one not of legal right to the earnings, but of the customary receipt of them. Thus a physician, paid by fees which are regarded as *honoraria*, may recover compensation for interruption of his professional labor.(b) A physician or midwife who, not having received a diploma from a regular medical college, cannot sue for a fee, may recover for interruption of professional labor.(c) But one who is forbidden by law to practice,—for instance, an unlicensed midwife,—can recover nothing.(d)

N.Y. Super. Ct. 394. *Physician:* Phillips *v.* London & S. W. Ry. Co., 5 C. P. Div. 280; Indianapolis *v.* Gaston, 58 Ind. 224; Logansport *v.* Justice, 74 Ind. 378; Holmes *v.* Halde, 74 Me. 28; Metcalf *v.* Baker, 57 N. Y. 662; McNamara *v.* Clintonville, 62 Wis. 207. *"Professional man":* Collins *v.* Dodge, 37 Minn. 503. *School teacher:* Bloomington *v.* Chamberlain, 104 Ill. 268. The dictum of Grover, J., in Masterton *v.* Mt. Vernon, 58 N. Y. 391, is in conflict with the current of authorities.

(a) Pennsylvania R.R. Co. *v.* Dale, 76 Pa. 47.

(b) Phillips *v.* London & S. W. Ry. Co., 5 C. P. Div. 280.

(c) Holmes *v.* Halde, 74 Me. 28; Luck *v.* Ripon, 52 Wis. 196; McNamara *v.* Clintonville, 62 Wis. 207.

(d) Jacques *v.* Bridgeport H. R.R. Co., 41 Conn. 61; Chicago W. D. Ry. Co. *v.* Lambert, 119 Ill. 255.

The amount of recovery is not necessarily based on the plaintiff's earnings at the time of the injury. Thus an unskilled engineer, who was learning his profession, may recover compensation based on the probable skill he would have acquired if the defendant had not put it out of his power to attend to his work.(a) And one not engaged in business at the time of the injury may recover compensation for being prevented in future from engaging in business in which he might reasonably expect success, though he was not entirely certain of it.(b)

§ 181. **Personal injury resulting in loss of business.**—Cases have already been examined where a personal injury results in a loss of the professional income of the plaintiff, which is, in a sense, a loss of the profits of a business. In many cases, where the injured party was at the head of an ordinary mercantile business, compensation is claimed for the loss of the profits of such business. In such a case the profits of the business would consist of three items: interest on the capital employed, the value of the personal services of the plaintiff, and the value of the good-will of the business. The first item would not be affected by the injury; the third might, if the personal exertions of the plaintiff had been the cause of the success of the business, but this would not be a result naturally to be expected from a personal injury, and would therefore be excluded, apart from any question as to the certainty of this item of the profits. The value of the plaintiff's personal services would therefore alone be left as fixing the amount to be recovered, and such value is to be estimated upon the principles just stated. It is well settled, therefore, that even if a personal injury results in a loss of profits of the plaintiff's business, no

(a) Howard Oil Co. *v.* Davis, 76 Tex 630.
(b) Fisher *v.* Jansen, 128 Ill. 549.

compensation can be recovered on account of such loss of profits; the recovery is limited to the value of the plaintiff's lost time.([a])

So in Masterton *v.* Mount Vernon ([b]) it was held error to allow evidence of the profits of the plaintiff, as a tea merchant, for several years previous, to be given as evidence of the loss sustained, by showing the falling-off in the year after the accident, in consequence of the injury. The plaintiff had testified that he was engaged in the tea-importing business, buying and selling teas; that it was his duty to buy the teas for the firm, but that in consequence of the injury he could not make purchases, and there was a great falling-off in the business. Grover, J., said: "Where, in such a case, the plaintiff has received a fixed compensation for his services, or his earnings can be shown with reasonable certainty, the proof is competent. . . . . In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business; or, that the amount of past profits derived therefrom may be shown to enable the jury to *conjecture* what the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages." He continued: "But the profits of importing and selling teas are still more uncertain. In some years they may be large, and in others attended with loss. The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a

([a]) Marks *v.* Long Island R.R. Co., 14 Daly 61; Bierbach *v.* Goodyear R. Co., 54 Wis. 208.

([b]) 58 N. Y. 391.

right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to uncertain profits of commercial ventures, in which the plaintiff, if uninjured, would have been engaged." It is to be noticed that a decision on this point was unnecessary, as the case went off on other grounds. The principle here intimated, that a plaintiff should not necessarily recover as the value of his time, what it had been worth in the past, is established.

§ 182. **Profits of an established business.**—Where it clearly appears that the defendant has interrupted an established business from which the plaintiff expected to realize profits, the plaintiff should recover compensation for whatever profit he makes it reasonably certain he would have realized. Here as elsewhere the question is one of fact: whether the profit can be proved with reasonable certainty.(a) In an Illinois case the court said:(b)

"We all know that in many, if not all, professions and callings,

(a) Lancashire & Y. Ry. Co. *v.* Gidlow, L. R. 7 H. L. 517; Simpson *v.* London & N. W. Ry. Co., 1 Q. B. D. 274; Gunter *v.* Astor, 4 Moore 12; Ingram *v.* Lawson, 6 Bing. N. C. 212; Llewellyn *v.* Rutherford, L. R. 10 C. P. 456; Sonneborn *v.* Stewart, 2 Woods 599; Selden *v.* Cashman, 20 Cal. 56; Lambert *v.* Haskell, 80 Cal. 611; Sturgis *v.* Frost, 56 Ga. 188; Smith *v.* Eubanks, 72 Ga. 280; Stewart *v.* Lanier H. Co., 75 Ga. 582; Chapman *v.* Kirby, 49 Ill. 211; Lawrence *v.* Hagerman, 56 Ill. 68; Dobbins *v.* Duquid, 65 Ill. 464; Smith *v.* Wunderlich, 70 Ill. 426; Terre Haute *v.* Hudnut, 112 Ind. 542; Pettit *v.* Mercer, 8 B. Mon. 51; Dennery *v.* Bisa, 6 La. Ann. 365; Moore *v.* Schultz, 31 Md. 418; Shafer *v.* Wilson, 44 Md. 268; Lawson *v.* Price, 45 Md. 123; White *v.* Moseley, 8 Pick. 356; French *v.* Connecticut R. L. Co., 145 Mass. 261; Chandler *v.* Allison, 10 Mich. 460; Allison *v.* Chandler, 11 Mich. 542; Goebel *v.* Hough, 26 Minn. 252; Cushing *v.* Seymour, 30 Minn. 301; Marqueze *v.* Sontheimer, 59 Miss. 430; Holden *v.* Lake Co., 53 N. H. 552; Luse *v.* Jones, 39 N. J. L. 707; Lacour *v.* New York, 3 Duer 406; St. John *v.* New York, 6 Duer 315; Walter *v.* Post, 6 Duer 363; Alexander *v.* Jacoby, 23 Oh. St. 358; Willer *v.* Ore. Ry. & Nav. Co., 15 Ore. 153; Pennsylvania R.R. Co. *v.* Dale, 76 Pa. 47; Simmons *v.* Brown, 5 R. I. 299; Trafford *v.* Hubbard, 15 R. I. 326; Shepard *v.* Milwaukee Gas Light Co., 15 Wis. 318.

(b) Walker, J., in Chapman *v.* Kirby, 49 Ill. 211, 219.

years of effort, skill and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it then be said, that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another? It has long been well-recognized law, that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show, that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damages can be shown by demonstration. By this means they can be ascertained with a reasonable degree of certainty."

Allison *v.* Chandler,[a] the leading case on this subject, was a case where the defendant, a landlord, wrongfully ejected the plaintiff, his tenant, from premises where he was established as a jeweller. In an able opinion the court held that the plaintiff was entitled to damages for injury to his business.

The defendant broke his contract not to compete with the plaintiff's business. It was held that the plaintiff might recover compensation for the profit he had lost, to be ascertained by comparing the amount his business actually fell short of what he might have done, with the business done by the defendant.[b] Where the injury complained of was, that the defendants had invited the plaintiff's servants to dinner, and induced them to leave him, the injurious consequence complained of was, that the plaintiff had lost the profits of the sales of pianos for two years; and this was held not to be too remote,

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[a] 11 Mich. 542.

[b] Peltz *v.* Eichele, 62 Mo. 171.

although the servants were not hired by the plaintiff for any definite period, but worked by the piece. Richardson, J., remarked: "The measure of damages he is entitled to receive from the defendants is not necessarily to be confined to those servants he might have in his employ at the time they were so enticed, or for the part of the day on which they absented themselves from his service; but he is entitled to recover damages for the loss he sustained by their leaving him at that critical period." [1]

The defendant raised an embankment, by which he cut off the plaintiff's access to a river. The plaintiff used the river to get the products of his farm to market. It was held that he could recover the loss of profits of his farm due to loss of market.([a]) The defendant obstructed a river, as a consequence of which the plaintiff lost custom at his hotel on the bank. It was held that he could recover compensation for the diminution in his business and profits.([b]) No damages can be recovered for injury to an unlawful business, such as gambling.([c])

The business may be of such an uncertain nature that its profits never become established. For instance, where the defendant wrongfully took the fixtures from the plaintiff's premises, which the plaintiff let from time to time for entertainments, it was held that profits expected were too speculative.([d]) Where the defendant injured the plaintiff's fish-net, it was held that the business of fishing with nets was too uncertain for the court to make any allowance for loss of profits.([e]) Where a

[1] Gunter *v.* Astor, 4 Moore, 12.

([a]) Willer *v.* Oregon Ry. & N. Co., 15 Ore. 153.
([b]) French *v.* Connecticut R. L. Co., 145 Mass. 261.
([c]) Kauffman *v.* Babcock, 67 Tex. 241.
([d]) Willis *v.* Branch, 94 N. C. 142.
([e]) Wright *v.* Mulvaney, 46 N W. Rep. 1045 (Wis.).

river boat lost a trip through a collision, it was held that the profits expected from the return trip were too conjectural for recovery.([a]) This would hardly be true in the ordinary case. It was held in North Carolina that where the plaintiff had been in the business of manufacturing patented machines and the business was broken up, he could recover profits only so far as he could show orders for machines; profits based on his sales for the year before were too uncertain.([b]) The decision is questionable. It might, however, be supported if the demand for the machine, being a patented one and so presumably novel, were ephemeral.

§ 183. **Of a new business.**—Where the plaintiff was about to embark on a new business venture, which was wrongfully prevented by the defendant, he can recover nothing on account of the expected profits: for there is nothing to prove that a profit would have been made.([c]) Where the defendant fails to furnish machinery for a new use, he cannot be held to compensate the plaintiff for the profits he might have made.([d]) The measure of damages is the ordinary value of the use of the machine. So, in Cory *v.* Thames I. W. & S. B. Co.,([e]) the plaintiff intended to use the machine ordered for a novel purpose, by which he claimed that he could make large profits; but the court held that the measure of damages was the value of the use of the machine for the purpose it was ordinarily used for. So where the defendant destroys a building in course of erection by the plaintiff,

([a]) Hunt *v.* Hoboken L. I. Co., 3 E. D. Smith 144.

([b]) Jones *v.* Call, 96 N. C. 337.

([c]) Red *v.* Augusta, 25 Ga. 386; Kenny *v.* Collier, 79 Ga. 743; Green *v.* Williams, 45 Ill. 206; Hair *v.* Barnes, 26 Ill. App. 580; Morey *v.* Metropolitan G. L. Co., 38 N. Y. Super. Ct. 185.

([d]) Coweta F. M. Co. *v.* Rogers, 19 Ga. 416; Crabbs *v.* Koontz, 69 Md. 59.

([e]) L. R. 3 Q. B. 181.

prospective profits which the plaintiff might have made by renting the building are not recoverable.[a] A publisher of a paper who merely by mistake neglects to insert an advertisement of the sale of real estate, is liable only for the amount paid for the advertisement, not for speculative damages.[b] In an action of replevin for a boat which was taken from the plaintiff at a time when he was about to use it in getting oats from a stranded vessel, the profits which he expected in that way to gain cannot be considered.[c]

§ 184. **Damages for obstructing the use of land.**—Where an owner of land is wrongfully prevented from occupying it, the measure of his damages is the value of the use of the land,—that is, its rental value. So where the plaintiff's farming land was wrongfully overflowed by the defendant, the measure of damages is the use of the land, not the value of the crops that might have been raised on it.[d] But since the rent depends upon the nature of the land, that may be shown; and as the net profits realized from the use of it afford the best indication of the value of its use, they may be shown if they can be proved with reasonable certainty. Thus where the defendant by a malicious and unfounded injunction prevented the plaintiff from using its coal lands for a year, it was held that not only the nature and extent of the coal beds, but also the profit on possible sales of coal, might be shown, "not in order to be allowed by the jury as profits, but to be treated as one of the facts that throw light upon the value of the rights taken."[e]

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[a] Bingham *v.* Walla Walla, 3 Wash. 68.
[b] Eisenlohr *v.* Swain, 35 Pa. 107.
[c] Aber *v.* Bratton, 60 Mich. 357.
[d] Chicago *v.* Huenerbein, 85 Ill. 594.
[e] Newark Coal Co. *v.* Upson, 40 Oh. St. 17.

And where the defendant, by wrongfully blasting in the neighborhood of the plaintiff's factory, caused the plaintiff's workmen to leave the building at each blast, under a reasonable apprehension of danger, it was held that the plaintiff might recover the value *to him* of the time thus lost; not necessarily measured by the wages paid.[a]

§ 185. **Failure to give possession of real estate.**—Where a lessor fails to give possession of the leased premises, the measure of damages is the difference between the actual rental value and the rent reserved. The rule is the same, whether the leased property is a farm,[b] a dwelling-house or hotel,[c] or business premises.[d] If, however, the premises were necessary to the plaintiff for carrying on an established business, and that fact were known to the defendant at the time the lease was made, the plaintiff might on principles elsewhere discussed recover further damages. The measure of damages would be the difference between the rent and the value for the plaintiff's business, which would involve an allowance of profits.[e] If the business were a new one, since there could be no basis on which to estimate profits, the plaintiff must be content to recover according to the general rule. The profits expected from a singer's performance are not certain enough to be recovered in

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[a] Hunter *v.* Farren, 127 Mass. 481.

[b] Snodgrass v. Reynolds, 79 Ala. 452; Rose *v.* Wynn, 42 Ark. 257; Olmstead *v.* Burke, 25 Ill. 86; Robrecht *v.* Marling, 29 W. Va. 765. But *contra*, Avan *v.* Frey, 69 Ind. 91; where the court allowed the plaintiff to show the value of the crops that could have been raised on the land during the period of the lease, "with a view to laying grounds for damages." There was no argument nor citation of authorities.

[c] Hexter *v.* Knox, 63 N. Y. 561.

[d] Townsend *v.* Nickerson Wharf Co., 117 Mass. 501; Giles *v.* O'Toole, 4 Barb. 261; Fondavila *v.* Jourgensen, 52 N. Y. Super. Ct. 403.

[e] Ward *v.* Smith, 11 Price 19; Hexter *v.* Knox, 63 N. Y. 561; Poposkey *v.* Munkwitz, 68 Wis. 322.

an action by the lessee of an opera-house against the lessor for breach of a contract to furnish it by a certain time for the lessee's use.(a)

§ 186. **Failure to put a structure on land.**—Where the defendant agreed to put a new mill on the plaintiff's land, but failed to do so, the plaintiff can recover nothing on account of loss of profits.(b) If the mill was built, but the completion of it was wrongfully delayed, rent of the mill for the period of delay may be recovered, but not expected profits from the use of it.(c) A plaintiff cannot recover on defendant's failure to make improvements on a lot, the profits which he would have made by erecting a distillery on the lot, as he intended to do.(d) But upon failure to repair an established mill the plaintiff may recover the profit he would have made by sawing the logs ready for manufacture at the mill.(e)

In a case where the defendant attempted to recoup, in an action on a building contract, the rent which he might have obtained from the store if it had been finished at the agreed time, it was held that the plaintiff could reduce the recovery to nominal damages by showing that the building if finished at the agreed time could not have been rented.(f) In a somewhat similar case in Michigan, where a mill remained idle through non-delivery of machinery, Cooley, J., went further, and intimated that the plaintiff, as part of his case, should show that the mill might have been rented, or else he should be allowed to recover no damages.(g) The latter case would hardly be

(a) Academy of Music *v.* Hackett, 2 Hilt. 217.
(b) Jones *v.* Nathrop, 7 Col. 1.
(c) Abbott *v.* Gatch, 13 Md. 314.
(d) Hahn *v.* Horstman, 12 Bush 249.
(e) Hinckley *v.* Beckwith, 13 Wis. 31.
(f) Wagner *v.* Corkhill, 40 Barb. 175.
(g) Allis *v.* McLean, 48 Mich. 428.

followed; and even the former case seems very questionable. Rent is given, not as specific damage, but as a fair average measure of compensation for interfering with the owner's use of property: and no inquiry should be permitted as to the likelihood in the particular case of rent having been obtained. In fact, how can it be proved with reasonable certainty that rent could not have been obtained? In an action for mesne profits the plaintiff recovers the fair rental value, irrespective of the actual yield or income, and this case is analogous.[a]

§ 187. **Loss of use of a road or bridge.**—Where the defendant failed to complete and deliver to the plaintiff a line of railroad at the agreed time, the measure of damages is the value of the use of the road during the time of delay. Expected profits from the use of the road cannot be recovered.[b] The defendant failed to finish a turnpike at the time prescribed by the contract; in an action the plaintiff claimed compensation on account of the loss of tolls during the period of delay. It was held, however, that the loss was too uncertain and conjectural.[c] But where the plaintiff's toll-bridge, which had been in use for some time, was carried away, through the fault of the defendants, it was held that the plaintiff could recover compensation for loss of the tolls during the time reasonably necessary to rebuild.[d] In this case, the business being an established one, the profits of it were not conjectural.

§ 188. **Damages for wrongful eviction.**—Where an occupant of real estate has been wrongfully evicted, the gen-

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[a] Campbell *v.* Brown, 2 Woods 349; Bolling *v.* Lersner, 26 Gratt. 36.

[b] Phillips & C. C. Co. *v.* Seymour, 91 U. S. 646; Hunt *v.* Oregon P. Ry. Co., 36 Fed. Rep. 481; Snell *v.* Cottingham, 72 Ill. 161.

[c] Western G. R. Co. *v.* Cox, 39 Ind. 260.

[d] Sewall's F. B. Co. *v.* Fisk, 23 N. H. 171.

eral measure of damages would be the value of the lease. In a case in Ohio, the defendant had agreed to make to the plaintiff, for the term of ten years, a lease of certain lands on which to plant and cultivate a peach orchard. The plaintiff took possession of the land, but the defendant failed to make the lease, and within two years from the time of the plaintiff's occupation of the premises caused him to be evicted. Evidence of the probable future profits of the land was held incompetent in determining the plaintiff's damages. To the extent that they depended on the loss of use of the land, its market value at the time of the eviction, subject to the performance of the contract on the plaintiff's part, furnished the standard of their assessment. If it had no general market value, its value should be ascertained from the opinions of qualified witnesses, in view of the hazards of the business.([a]) If, however, the natural result of the eviction would be injury to an established business, the plaintiff should also recover compensation for the injury to his business.([b]) This has been said to be an allowance of compensation for the *good-will* of the premises.([c]) If there is no safe criterion by which to estimate profits, no compensation for the loss of them can be recovered.

Where the defendant prevails in an action for forcible entry and detainer, and is allowed by the statute damages for the eviction, it is doubtful whether he can in any case recover more than the value of the property taken pos-

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([a]) Rhodes *v.* Baird, 16 Oh. St. 573.

([b]) Shaw *v.* Hoffman, 25 Mich. 163; Seyfert *v.* Bean, 83 Pa. 450. It was held in Denison *v.* Ford, 10 Daly 412, that such damages could not be recovered; this decision must be rested on the ground of remoteness, not of uncertainty. In Louisiana, under the code, there can be no recovery of profits in such cases: Redon *v.* Caffin, 11 La. Ann. 695.

([c]) Llewellyn *v.* Rutherford, L. R. 10 C. P. 456.

session of.[a] In every decided case of the sort, however, the decision has been rested on other grounds, and no intimation has been given of the court's opinion upon the point.

§ 189. **Loss of the use of business premises.**—When the wrongful act of the defendant deprives the plaintiff of the use of business premises, the measure of damages would ordinarily be the value of the use of the premises, that is, their rental value.[b] If, however, the business is an established one, and the interruption of business not remote, the plaintiff may recover the value of the use of the premises to him in his business. This has been held in an action for direct injury to business premises,[c] for diversion or obstruction of water from a mill,[d] and for destruction of a mill dam [e] or failure to keep it in repair.[f] The profits previously made may be shown in order that the jury may estimate the value of such use.[g] But the plaintiff cannot recover compensation for the loss of expected specific profits; the earning of such profits is too conjectural, and depends upon too many contingencies.[h] In a Canadian case, an action for detention of the plaintiff's logs by the defendant, it was held that "the loss of use of the plaintiff's mill was too uncertain, and its ascertainment too much dependent on contingencies and

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[a] Howser *v.* Melcher, 40 Mich. 185; Hayden *v.* Florence S. M. Co., 54 N. Y. 221.

[b] Sinker *v.* Kidder, 123 Ind. 528.

[c] Allison *v.* Chandler, 11 Mich. 542; Schile *v.* Brokhahus, 80 N. Y. 614.

[d] Gibson *v.* Fischer, 68 Ia. 29; Woodin *v.* Wentworth, 57 Mich. 278; Colrick *v.* Swinburne, 105 N. Y. 503; Pollitt *v.* Long, 58 Barb. 20.

[e] White *v.* Moseley, 8 Pick. 356; Simmons *v.* Brown, 5 R. I. 299.

[f] Winne *v.* Kelley, 34 Ia. 339; Bostwick *v.* Losey, 67 Mich. 554.

[g] Crawford *v.* Parsons, 63 N. H. 438.

[h] Dodds *v.* Hakes, 114 N. Y. 260; Pollitt *v.* Long, 58 Barb. 20; Cincinnati *v.* Evans, 5 Oh. St. 594; Marrin *v.* Graver, 8 Ont. 39.

conjectures, and too remote."(a) The true ground on which to rest the decision seems to be the remoteness and not the uncertainty of the loss.

§ 190. **Injury to machinery.**—When machinery is not furnished according to agreement, or is wrongfully injured, the measure of damages is the value of the use of it; and if the natural result is to stop the mill, the value of the use of that also. This is not an allowance of the profits which in the particular case might have been made, but of the average sum, represented by rent, which such property is worth. Expected profits, in such a case, are entirely too contingent; but rent is sufficiently certain to be allowed. The distinction is well shown by two New York cases, in the first of which profits were not, and in the other the value of the use was, allowed to be recovered. The first case was an action brought for the price of a steamboat. The defendant showed that part of the machinery was unsound, and proved other imperfections by which considerable delay was caused; and claimed to deduct from the contract price of the boat not only the sum necessary to remedy the actual defects, but also loss of profits upon the trips that might have been run during the time the vessel was delayed on account of the imperfections in the construction, having proved that each trip would bring one hundred dollars net profits. But it was disallowed; and the court, citing the language of Pothier, said: "In short, it will be seen that on the subject in question our courts are more and more falling into the track of the civil law."[1]

The other was an action for the non-delivery of certain machinery which was to be used in the plaintiff's mill. The court allowed the plaintiff to recover not only the

[1] Blanchard *v.* Ely, 21 Wend. 342.

(a) Godard *v.* Fredericton Boom Co., 6 All. (N. B.) 448.

value of the machinery, but also the rent which might have been obtained from the use of the machinery.([a])

Selden, J., delivering the opinion of the court, said:

"Had the defendants, in the case of Blanchard *v.* Ely, taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiff's contract. . . . . The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., etc., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is upon the whole a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly if not quite as certain as the market value of commodities at a particular time and place."

Where, then, the defendant's wrongful act resulted in the stoppage of machinery, the measure of damages is the value of the use, that is, the rental value of the machinery;([b]) so in an action against a carrier for delay in

([a]) Griffin *v.* Colver, 16 N. Y. 489, 496.

([b]) Cory *v.* Thames I. W. & S. B. Co., L. R. 3 Q. B. 181; Satchwell *v.* Williams, 40 Conn. 371; Strawn *v.* Cogswell, 28 Ill. 457; Benton *v.* Fay, 64 Ill. 417; Griffin *v.* Colver, 16 N. Y. 489; Cassidy *v.* Lefevre, 45 N. Y. 562;

delivering the machinery ; ([a]) against a manufacturer of machinery for failure to furnish it according to contract ; ([b]) against one who broke a contract to keep machinery in repair.([c]) When a mill was prevented from being run by reason of a steam-engine not being furnished for it according to contract, the loss of use of the mill during the time of its being stopped was held to be rightly included in the damages. The court said: "When a contractor undertakes to perform a contract to erect a building or put a mill or other machinery in operation, he ought to be holden to indemnify the other party against the loss of the use of the building, mill, or other machinery, after the expiration of the time for performance of the contract. And in case it was defectively made, he should indemnify the party for the loss of the use of the property for the time necessarily required to repair it and put it in order." ([d])

But profits expected from the use of the machinery cannot be recovered as such.([e]) The defendant agreed to build a foundation for a mill which the plaintiff had bought and was to move to the foundation ; it was held that the plaintiff, in an action for breach of the agreement, could recover the rental value of the mill, though he could not recover compensation for the loss of expected

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Freeman *v.* Clute, 3 Barb. 424; Davis *v.* Talcott, 14 Barb. 611 ; Pittsburgh Coal Co. *v.* Foster, 59 Pa. 365; Pettee *v.* Tennessee M. Co., 1 Sneed 381 ; Hinckley *v.* Beckwith, 13 Wis. 31.

([a]) Priestley *v.* Northern I. & C. R.R. Co., 26 Ill. 205.

([b]) Green v. Mann, 11 Ill. 613.

([c]) Middlekauff *v.* Smith, 1 Md. 329.

([d]) Taggart, P. J., in Davis *v.* Talcott, 14 Barb. 611, 628.

([e]) Willingham *v.* Hooven, 74 Ga. 233; McKinnon *v.* McEwan, 48 Mich. 106; Allis *v.* McLean, 48 Mich. 428 ; Krom *v.* Levy, 48 N. Y. 679; Davis *v.* Cincinnati H. & D. R.R. Co., 1 Disney 23; Pennypacker *v.* Jones, 106 Pa. 237.

profits.[a] But in an action for breach of a similar contract, where the plaintiff, instead of moving an old mill to the foundation was to build a new mill upon it, the loss of use of the mill was too uncertain and conjectural for compensation.[b]

§ 191. **Injury to crop.**—A farmer cannot in general recover damages for the loss of profit he expected from a crop destroyed before maturity. The value of the mature crop is too uncertain.[c] Thus, where the defendant wrongfully seized the plaintiff's negroes, the profits of a crop he expected to plant and cultivate by means of the negroes are too uncertain to afford ground for recovery.[d] The defendant wrongfully seized the plaintiff's mule, which he intended to use to cultivate his crop; the loss of his crop was held both too uncertain and too remote for compensation.[e] If the mule were intended to use for the harvesting of a crop already matured, the loss would not be too uncertain. The defendant sold a drug which he warranted to kill cotton-worm; but it failed to do so. It was held that the loss of the crop was too uncertain to afford ground for recovery.[f] In Louisiana, under the Code, where the crop of a sugar planter was ruined by the defendant's tort, it was held that the planter could recover for the loss of crop, based on the average crop of that year, which happened to be a good one.[g] In California the same decision has been reached

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[a] Rogers *v.* Bemus, 69 Pa. 432.

[b] Bridges *v.* Lanham, 14 Neb. 369.

[c] Gresham *v.* Taylor, 51 Ala. 505; Richardson *v.* Northrup, 66 Barb. 85; Roberts *v.* Cole, 82 N. C. 229; Texas & S. L. R.R. Co. *v.* Young, 60 Tex. 201.

[d] McDaniel *v.* Crabtree, 21 Ark. 431.

[e] Sledge *v.* Reid, 73 N. C. 440.

[f] Jones *v.* George, 56 Tex. 149.

[g] Payne *v.* Railroad & S.S. Co., 38 La. Ann. 164.

in a case where the defendant broke a contract to lease a farm to the plaintiff: the court allowed the plaintiff to recover compensation based on the crop the average farmer would have raised with such tools, teams, etc., as the plaintiff had.(a) In cases such as the last two, the rule, in the light of principle, would seem to be the value of the use of the land, evidence of the average value of the crop of that or other years being admissible.

Where seed is warranted good and does not grow, expected profits from the crop to be raised are too uncertain. The rent of the land and the wasted labor and expense furnish all the compensation that are certain enough to base recovery upon.(b) If, however, a crop is raised, but is of inferior quality, the element of uncertainty is removed. The value of the crop, if it had been of the quality warranted, can be ascertained with exactness; and the measure of damages is the difference between the value of the crop raised, and the value of the same crop from the seed ordered.(c) So in the case of unproductive hop roots warranted by the defendant, the plaintiff was allowed to recover the profit he would have made on the plants that grew if they had been productive.(d)

It will be noticed that there are three classes of cases arising out of the breach of warranty of seed. In the first class of cases, the seed is of such a quality that

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(a) Rice *v.* Whitmore, 74 Cal. 619.

(b) Ferris *v.* Comstock, 33 Conn. 513; Butler *v.* Moore, 68 Ga. 780. Page *v.* Pavey, 8 C. & P. 769, *contra*, is a bare intimation at *nisi prius*.

(c) Randall *v.* Raper, E. B. & E. 84; Wolcott *v.* Mount, 36 N. J. L. 262; Passinger *v.* Thorburn, 34 N. Y. 634; White *v.* Miller, 7 Hun 427; 71 N. Y. 118; Flick *v.* Wetherbee, 20 Wis. 392. In Van Wyck *v.* Allen, 69 N. Y. 61, there was an intimation that the decision on this point in the case of Passinger *v.* Thorburn was still open for revision. And Hurley *v.* Buchi, 10 Lea 346, holds that even where the crop from the inferior seed matured, no compensation can be recovered for loss of crop.

(d) Schutt *v.* Baker, 9 Hun 556.

nothing grows from it. In such cases there is no basis for the estimation of expected profits, and they are therefore disallowed as uncertain. In the second class of cases the plants grow and the crop matures, but is of inferior quality. Here there is a reasonable basis on which to estimate the profit that would have been made if the seed had been of the quality called for by the contract; for the court has only to estimate the difference in value between the crop actually raised and the same crop of the proper quality. An allowance in these cases is therefore made for loss of profits. The third class of cases lies between the first two. The plants grow, but are of such a sort that no crop matures at all. Here the expected profit is less conjectural than in the first class of cases, for the possible extent of the crop is limited by the number of plants which grow. On the other hand, the profit is more conjectural than in the second class of cases, for there is no matured crop as a basis for estimating the profit.

§ 192. **Profits of a contract.**—The benefits which would have accrued to the plaintiff from a contract broken by the defendant may be recovered, though they are in a certain sense contingent. The plaintiff, as has been seen, must prove that the benefit would have been secured. "The jury cannot be asked to guess. They are to try the case upon evidence, not upon conjecture." [a] But having made it appear reasonably certain that he would have obtained a benefit, the plaintiff is entitled to recover it.

The leading case on this subject is Masterton *v.* Mayor of Brooklyn,[b] which will be more fully considered later. In that case it appeared that in January, 1836,

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[a] Strong, J., in Lentz *v.* Choteau, 42 Pa. 435.

[b] 7 Hill 61.

an agreement was entered into between the defendants and the plaintiffs, by which the latter agreed to furnish and deliver marble to build a City Hall in Brooklyn, from Kain & Morgan's quarry, in Eastchester. The defendants were to pay $271,600 in different sums, as the work proceeded. The plaintiffs proved the delivery of the marble under their contract with the defendants, till July, 1837; when the latter refused to receive any more marble, although the plaintiffs were ready to proceed. The entire quantity of marble necessary to fulfil the plaintiff's contract was 88,819 feet. At the time the work was suspended, the plaintiffs had delivered 14,779 feet, for which the contract price had been paid. The defendant claimed that the profits expected from a full performance of the contract were too contingent and speculative to be allowed. The court, however, held otherwise. Nelson, C. J., said that without doubt there were expected profits which would be excluded as uncertain in actions of contract; such, for instance, as the profits of a collateral undertaking entered into on the faith of the defendant's contract. "But," he continued, "profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon, before the contract was made, and formed, perhaps, the only inducement to the arrangement."

And the learned chief justice fortified this allowance of profits, by reference to the civil law, and the analogies

derived from the cases in our own law, which we shall hereafter have occasion to consider, where upon non-performance of contracts for the sale and delivery of chattels, the market price, which of course includes profits, is made the measure of compensation. There is now no difficulty in such cases as the foregoing. The direct benefits or profits of a contract are always allowed.

§ 193. **Contracts for a share in the profits of a business.**— In that class of contracts, however, where the benefit secured is *a share in the profits of a business*, there is, as we have seen, difficulty. In Bagley *v.* Smith,[a] which was an action for the wrongful dissolution of a partnership, it was insisted by the defendant's counsel that the making of either the prospective or the past profits of a partnership the basis of a rule of damages was contrary to principle; that the inquiry into past profits involved the taking of an account which was impracticable in a trial at law, and that there was no basis for the jury to measure the fluctuations of trade, the danger of losses, and the effects of competition, which were all involved in a calculation of future profits. Moreover, as the profitable prosecution of the business of the firm depended on the mutual confidence and harmonious co-operation of its members, its dissolution under circumstances which precluded these conditions, could not subject the withdrawing partner to damages on the basis of prospective profits.

But the court held that no rule of law required that the breach of a covenant contained in partnership articles should be compensated by nominal damages only; that as the object of commercial partnerships was profit, the most direct and legitimate injury which could be occasioned by an unauthorized dissolution of a firm was the

[a] 10 N. Y. 489.

loss of profits; that although there was great inherent difficulty in accurately estimating future gains, this difficulty would not be lessened by shutting out the light from the past, and that as no one out of a court of justice could undertake to judge of the future profits of a business without informing himself, if practicable, as to those in the past, there appeared to be no reason why a legal tribunal should do so. The court also refused to limit the plaintiff's claim for profits to the period between the dissolution and his subsequent entry into business.

The practice, established in New York by the above case of Bagley *v.* Smith, of admitting evidence of past profits, not as in themselves a safe measure of future profits, but as very pertinent to the question what the future profits would probably have been had not the business been interrupted, and as a material aid to the jury in the solution of this question, has been elsewhere sanctioned, and may be taken, to the extent here stated, as the general rule.([a])

Where an action was brought for breach of an agreement to form a partnership, and it was proved that the plaintiff had given up an East India voyage, as was well known to the defendant, he was allowed to show the value of the voyage, not as special damage, but as an ingredient for estimating the value which each of the parties set on the contract in dispute.[1] Where, however, the partnership was terminable at any time upon notice, no recovery can be had on account of expected future profits.([b])

In Dennis *v.* Maxfield ([c]) the plaintiff was hired for a

[1] M'Neill *v.* Reid, 9 Bing. 68.

([a]) Gale *v.* Leckie, 2 Stark. 107; Dart *v.* Laimbeer, 107 N. Y. 664; Reiter *v.* Morton, 96 Pa. 229.

([b]) Skinner *v.* Tinker, 34 Barb. 333; Ball *v.* Britton, 58 Tex. 57.

([c]) 10 All. 138.

whaling voyage, and was to receive a certain "lay" or percentage of the profits, and additional compensation if the cargo reached a certain amount. Being wrongfully dismissed, it was held he could recover compensation for both items of loss, the voyage having ended and the profits of the voyage being known. The court (Bigelow, C. J.) said: "The parties have expressly stipulated that profits should be the basis on which a portion of the plaintiff's compensation for services should be reckoned. These earnings or profits were therefore within the direct contemplation of the parties, when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of estimation; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled." The court then cited contracts of partnership and of insurance of profits, and continued: "In such cases the parties, having by their contract adopted a contingent, uncertain, and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach. If this is not the rule of law, we do not see that there is any alternative short of declaring that where parties negotiate for compensation or indemnity in the form of an agreement for profits or a share of them, no recovery can be had on such a contract in a court of law—a proposition which is manifestly absurd."

This, it must be noted, is a contract where the profits are those of a business, not the profits of the plaintiff's individual exertions. He may in such a case wait until the business is completed and the profit realized, and then

recover his proportion, as he did in the case just cited; or if the business has been so long established that he can reasonably prove that a profit will be realized, he may recover at once upon the breach.(a) But if it is a new enterprise, and there is no proof that profit will be made, the plaintiff can prove no loss and should recover no damages on account of the loss of profits; the burden of proving a profit is upon him.(b) Thus, where the plaintiff had a contract by which he was to have half the wood standing on a certain lot for cutting and cording it, and the standing wood was negligently destroyed by the defendant, it was held that the plaintiff could recover no compensation for the profit he might have made, for it was too uncertain.(c)

§ 194. **Collateral profits.** — Profits which the plaintiff might have made in any other transactions if the defendant had performed his contract, even though the loss of them is a natural consequence of the wrong, are frequently disallowed, on the ground that they are more or less speculative and contingent. He is able only to show that he *might* have made those profits. He is not able to prove that he certainly could or would have made them if the defendant had not committed any wrong. In Fox *v.* Harding (d) the court said that "If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate result of its fulfilment," then they should be allowed. "But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the princi-

(a) Wakeman *v.* Wheeler & W. M. Co., 101 N. Y. 205.
(b) Winslow *v.* Lane, 63 Me. 161.
(c) Barnard *v.* Poor, 21 Pick. 378.
(d) 7 Cush. 516; *acc.* Smith *v.* Flanders, 129 Mass. 322.

pal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." When that is the objection, the plaintiff is usually given the average of profits, as being what he would probably have made. On a contract to furnish a boat to ferry excursionists who were to arrive at a certain time, the measure of damages was held to be the ordinary earnings of such a boat at such a time.([a]) But where the boat was to be used as an excursion boat on an entirely new route, anticipated profits are too uncertain, and nothing can be recovered on account of the loss of use of the boat.([b]) So on a breach of contract to furnish an excursion train to the plaintiff, the profit he would have made on tickets already sold may be recovered; but profit he might have made by a sale of tickets after the breach of the defendant's agreement are too uncertain.([c])

It was attempted in a New York case([d]) (which is not sustained by later authorities) to apply this same rule in a case of partnership. The distinction is plain. In the latter case the plaintiff is attempting to recover the benefit conferred on him by the contract; here the profit is claimed, not as promised by the defendant, but as likely to arise collaterally out of the performance of the contract.

A railroad company agreed to locate houses for its hands near the plaintiff's land. It was held that possible loss of profits at his store and mill was too speculative.([e]) Where a railroad company failed to perform

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([a]) Mace *v.* Ramsey, 74 N. C. 11.
([b]) Mitchell *v.* Cornell, 44 N. Y. Super. Ct. 401.
([c]) Houston & T. C. Ry. Co. *v.* Hill, 63 Tex. 381.
([d]) Van Ness *v.* Fisher, 5 Lans. 236.
([e]) Evans *v.* Cincinnati S. & M. Ry. Co., 78 Ala. 341.

its agreement to make the city of Fort Scott the terminus of one division of its line, and erect machine-shops, etc., there, it was held that an inquiry into the value of real estate and amount of business, in order to show what profits would have been made, was improper; such profits were too speculative. But the city might recover for the value of the buildings to it as taxable property, to be estimated on the principle of annuity, on the average rate of taxation during past years.([a]) On a contract by the defendant to erect a factory or establish a business in a place where the plaintiff owned land, it has been held that profits which might have been made by the plaintiff through a rise in the value of his land are too uncertain.([b]) But in Watterson *v.* Allegheny V. R.R. Co.,([c]) an action for the defendant's breach of contract to construct a depot on land sold the plaintiff by the defendant, it was held that the plaintiff could recover the additional value which would accrue to the plaintiff's other land by the erection of such a depot, the court saying that the profits of the plaintiff's business could not be added to his damages, for they were too speculative and uncertain.

Where it can be made reasonably certain that a gain would have resulted, and there is no other objection to its allowance, the mere fact that the amount is to some extent conjectural will not prevent its allowance. In the case of Frye *v.* Maine Central R.R.([d]) it was held, in an action for breach of an agreement to allow plaintiff the carriage of passengers from D. to G., that the plaintiff could not only recover the profits he would have made on the car-

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([a]) Missouri, K. & T. Ry. Co. *v.* Fort Scott, 15 Kas. 435.

([b]) Shaw *v.* Hoffman, 25 Mich. 162; Dullea *v.* Taylor, 35 Up. Can. Q. B. 395.

([c]) 74 Pa. 208. This seems a very speculative measure of damages.

([d]) 67 Me. 414.

riage from D. to G., but also what he would have made on way passengers, on express, and on the mail, by being so situated that he could carry more cheaply than any one else.

§ 195. **Loss of use of personal property.**—Where the defendant wrongfully injured or withheld the plaintiff's chattel, the measure of damages is the average or usual value of the use of the chattel during the time the plaintiff lost the use of it.[a] If the owner had an established custom of letting the chattel for hire, so that the jury could determine what income he had from it, he may recover that income, which is analogous to the profit of an established business.[b] Thus where the plaintiff's stallion was injured by the defendant, it was held that the profits he would probably have made during the season could be shown, "not as the measure of damages, but as a guide to the exercise of that discretion which must always, to a certain extent, rest with the jury."[c] In an action for a fraudulent representation as to the age of a female slave, it was held not to be an element of the damage that she might have borne several children if she had been as young as represented. This is too uncertain.[d]

§ 196. **Loss of use of a vessel.**—In adjusting the damages against the official liquidator of a ship-building company for delaying the repairs of a ship beyond the time

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[a] Benton *v.* Fay, 64 Ill. 417; Shelbyville L. B. R.R. Co. *v.* Lewark, 4 Ind. 471; Monroe *v.* Lattin, 25 Kas. 351; Brown *v.* Hadley, 43 Kas. 267; Johnson *v.* Holyoke, 105 Mass. 80; Luce *v.* Hoisington, 56 Vt. 436; Wright *v.* Mulvaney, 46 N. W. Rep. 1045 (Wis.). But *contra*, McLaughlin *v.* Bangor, 58 Me. 398.

[b] Cushing *v.* Seymour, 30 Minn. 301.

[c] Fultz *v.* Wycoff, 25 Ind. 321.

[d] Whitson *v.* Gray, 3 Head 441.

agreed, the Lord Chancellor observed that "he had proceeded on the principle that if a profit would arise from a chattel, and it is left with the tradesman to repair, and detained by him beyond a stipulated time, the measure of damages is *prima facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time."(a) And the same rule applies where the defendant, the builder, delayed the delivery of a vessel beyond the stipulated time.(b) Where, in an action on a bond given to obtain the discharge of a vessel attached under a lien for repairs, the defendants sought to recoup the damages sustained by them from the plaintiff's delay in completing the contract, it was held that the probable earnings or profits of the vessel were too uncertain to form a rule of damages. The true measure of damages was the price which would have to be paid for the charter of a similar boat during the period of unnecessary detention, less all expenses which would necessarily have been incurred by the owner.(c) Where a vessel was injured by a collision, the measure of damages was held to be the loss of freight during the period she was laid up; in other words, the loss of use of the

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(a) *In re* Trent and Humber Co., L. R. 4 Ch. 112, 117, affirming L. R. 6 Eq. 396.

(b) Brown *v.* Foster, 51 Pa. 165. Bohn *v.* Cleaver, 25 La. Ann. 419, was an action for breach of an agreement to furnish the plaintiff, on a certain day, with a steamer for a full cargo to Liverpool or Havre, at a stipulated rate. The ship was not ready, but on that day freights to Liverpool were higher than the agreed rate. The plaintiff was not allowed to recover any damages, the court holding that they would be too speculative. Two judges, however, dissented, holding that the measure of damages was the difference between the contract and the ruling rate on a full cargo. This latter seems the correct view.

(c) Rogers *v.* Beard, 36 Barb. 31; S. C. 20 How. Pr. 98; Brown *v.* Foster, 51 Pa. 165.

vessel.(a) But expected specific profits cannot be recovered for the loss of use of a vessel.(b)

§ 197. **Profits expected from a sale of goods.**—The profits expected upon a sale of goods at retail cannot usually be recovered, for two reasons. In the first place, the value of the goods is their actual wholesale market price; in the second place, such profits are too contingent.(c)

The case of Wehle *v.* Haviland (d) is an important decision on this point. The action was for seizing the stock in trade of the plaintiff under an attachment. The court below, on the authority of an opinion previously expressed by the Commission of Appeals in the same case,(e) had allowed the plaintiff to recover the fair *retail* value of her goods. In the Court of Appeals this was held to have been an error, Allen J., saying: "The retail value or the price at which goods are sold at retail, includes the expected and contingent profits, the earning of which involves labor, loss of time and expenses, supposes no damage to or depreciation in the value of the goods, and is dependent upon the contingency of finding purchasers for cash, and not upon credit, within a reasonable time,

(a) Heard *v.* Holman, 19 C. B. (N. S.) 1; The Clarence, 3 Rob. Adm. 283; Williamson *v.* Barrett, 13 How. 101; The Potomac, 105 U. S. 630; The Mayflower, 1 Bro. Adm. 376, 388; The Narragansett, Olcott 388; The M. J. Sanford, 37 Fed. Rep. 148; New Haven S. B. Co. *v.* Vanderbilt, 16 Conn. 420; Mailler *v.* Express P. L., 61 N. Y. 312. But *contra*, Smyrna, L. & P. S. B. Co. *v.* Whillden, 4 Harr. 228. In Brown *v.* Beatty, 35 Up. Can. Q. B. 328, it was held that the loss of freight would not be compensated in an action at law, but only in a proceeding in admiralty; but the court in this seems to have been mistaken.

(b) Brown *v.* Smith, 12 Cush. 366; Aber *v.* Bratton, 60 Mich. 357; Callaway M. & M. Co. *v.* Clark, 32 Mo. 305; Marlow *v.* Lajeunesse, 18 Low. Can. Jur. 188.

(c) Young *v.* Cureton, 87 Ala. 727.

(d) 69 N. Y. 448.

(e) Reported as Wehle *v.* Butler, 61 N. Y. 245.

the sale of the entire stock without the loss by unsalable remnants, and the closing out of a stock of goods as none ever was or ever will be closed out, by sales at retail at full prices. . . . . The plaintiff was entitled to compensation, and that consisted of the market value of the goods, their cost, or what they would have cost in the market, and interest thereon, and nothing more. The retail profit was not included in the compensation to which she was entitled." If, however, no more goods of the sort are to be procured at wholesale, the retail price, if proved with reasonable certainty, may be recovered.([a])

§ 198. **Profits included in the market price.**—On the other hand, the owner of goods, or the purchaser of goods which are not delivered, may always recover the market price at the place where he should have had the goods; this often includes profits. So in trover, where the plaintiff recovers the value of the goods at the place of conversion, without taking into account their cost in some distant market, and the expenses of their carriage, he may really obtain profits.([b]) So in an action against a carrier for failure to deliver goods, the owner recovers the market value of the goods at the time and place of delivery.([c]) And in an action for failure to deliver goods bought, the purchaser's recovery is based upon the market value at the time and place of delivery.([d]) France *v.* Gaudet ([e]) rests upon this principle. The plaintiff had purchased champagne lying at defendant's wharf at 14*s.* per dozen, and resold it at 24*s.*; defendant refused to deliver the wine. The plaintiff could not fulfil his contract, as similar wine

([a]) Alabama I. W. *v.* Hurley, 86 Ala. 217. There being no wholesale market, the real value would be that at retail.

([b]) Blum *v.* Merchant, 58 Tex. 400.

([c]) See chapter on Carriers.

([d]) See chapter on Sales.

([e]) L. R. 6 Q. B. 199

was not procurable in the market. The defendant had no notice of the resale. It was held that the plaintiff could recover the price at which he had resold the champagne, since that was its actual value at the time and place of delivery. Other cases rest upon the same principle. So where by the defendant's fault the plaintiff's cattle are poorly pastured, he may recover compensation for the weight which they should have gained, that is, for the additional value they should have had in the market.(a)

§ 199. Profits expected from the manufacture of raw material.—Where raw material warranted by the defendant to be of a certain quality is manufactured by the plaintiff, and after being manufactured is discovered to be of inferior quality, the measure of damages is not the lessened value of the material, but of the product: provided, of course, the inferiority could not be discovered before manufacture. In Parks *v.* Morris A. & T. Co.(b) a plaintiff was allowed, in an action for breach of warranty as to the quality of steel, to recover the difference between the value of axes he had manufactured with the steel and the value of such axes if they had been manufactured of steel of the quality warranted. Where the plaintiff bought dust warranted to be of hard coal for use in making bricks, and it proved to contain soft coal dust, the measure of damages was the lessened value of the bricks.(c) Such cases seem to amount to an indirect allowance of profits, which form part of the *value* which the plaintiff has lost.

But where goods were purchased for manufacture, and were not supplied, the plaintiff cannot recover the ex-

(a) Hoge *v.* Norton, 22 Kas. 374; Gilbert *v.* Kennedy, 22 Mich. 117.
(b) 54 N. Y. 586.
(c) Milburn *v.* Belloni, 39 N. Y. 53.

pected profit of manufacture and sale of the manufactured goods.(a) Such profits are speculative. Where the defendant converted logs which the plaintiff was about to saw in his mill, and the plaintiff was unable to get other logs, it was held that the profits he would have made, *i. e.*, the full value of the lumber less the expense of sawing, could be recovered.(b) Where it appeared that the logs were afterwards delivered to the plaintiff, sawed, and sold, but that during the period of delay the price of lumber had fallen, such profits were measured by the difference between the price of lumber at the time of sale and at the time it would have been sold but for the defendant's delay.(c)

§ 200. **From competition or speculation.**—Profits expected from a competition or a speculation are too uncertain for compensation. In a case in England, where a prize had been offered for the best plan and model of a machine, and plans and models were to be sent by a certain day, the plaintiff sent a plan and model accordingly, by a railway; but through the negligence of their agents it did not arrive at its destination till after the time appointed; it was considered that the proper measure of damages was the value of the labor and materials expended on the plan and model, and that the chance of obtaining the prize was too remote to be estimated.[1] In a similar case in Pennsylvania this opinion was disapproved, the court holding that the value of the opportunity to compete for the premium furnished the measure of the plaintiff's damages. If the company were informed

[1] Watson *v.* Ambergate, N. & B. Ry. Co., 15 Jur. 448.

(a) French *v.* Ramge, 2 Neb. 254.

(b) Auger *v.* Cook, 39 Up. Can. Q. B. 537; Cockburn *v.* Muskoka M. & L. Co., 13 Ont. 343.

(c) Mississippi & R.R. B. Co. *v.* Prince, 34 Minn. 71.

of the object of the transmission, the loss of the privilege of the competition was in view of both parties when they entered into the contract, and if not, the loss was still the result of the carrier's negligent breach. But it appearing from the evidence of one of the committee by whom the prizes were awarded, that the plaintiff must at any rate have failed to obtain the prize, he was held entitled to nominal damages only.(a) The rule laid down by the English court seems most in accordance with principle.

It has been held that in an action for the wrongful transmission of a telegraph message, whereby the plaintiff was prevented from entering his horse in a race, no damages could be recovered on account of the chance of winning a prize.(b) And in an action for injuring a horse, the owner could recover nothing for the loss of the chance of winning prizes in races.(c) It has been held that the chance of obtaining employment in a particular situation, for which the plaintiff intended to apply, is too uncertain;(d) but the chance that a father would pay a son's debt to release him from custody can be estimated.(e)

A telegram ordering the purchase of oil at a certain price was delayed, until the next day, when the price had risen, and no oil was bought. It was held that no damages could be recovered of the telegraph company for loss of possible profit on a purchase and sale of oil; for the sale might not have been made, and the chance of gain was too contingent.(f)

(a) Adams Express Co. *v.* Egbert, 36 Pa. 360.
(b) Western U. T. Co. *v.* Crall, 39 Kas. 580.
(c) Mizner *v.* Frazier, 40 Mich. 592.
(d) Hoey *v.* Felton, 11 C. B. (N. S.) 142.
(e) Macrae *v.* Clark, L. R. 1 C. P. 403.
(f) Western U. T. Co. *v.* Hall, 124 U. S. 444.

Where the defendant agreed to pool his stock with the plaintiff's until it could be sold together, but broke the contract by selling to a stranger, who thereby obtained control of the corporation, it was held that the chance of realizing a profit by the pool was too contingent to be compensated.([a])

([a]) Havemeyer *v.* Havemeyer, 45 N. Y. Super. Ct. 464.

CHAPTER VI.

AVOIDABLE CONSEQUENCES.

§ 201. Plaintiff cannot recover for avoidable consequences.
202. Reason of the rule.
203. Rule sometimes results in enhancing damages.
204. Different from the rule of contributory negligence.
205. The rule of general application.
206. Contracts for personal services.
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208. Duty to seek employment does not arise in all contracts.
209. Landlord's agreement to repair.
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213. Reparation offered by defendant.
§ 214. Actions of tort.
215. Expenses of avoiding consequences recoverable.
216. Of following property.
217. Of repairing or reducing injury.
218. But only reasonable expenses.
219. Rule does not require impossibilities.
220. Statutory damages—Eminent domain.
221. Rule requires only ordinary care.
222. Other limits of the rule.
223. Plaintiff's knowledge—Notice.
224. Plaintiff need not anticipate wrong.
225. Plaintiff cannot be called on to commit wrong.
226. Defendant prevents plaintiff from avoiding consequences.
227. Burden of proof.
228. Court and jury.

§ 201. Plaintiff cannot recover for avoidable consequences.—* The same principle which refuses to take into consideration any but the direct consequences of the illegal act, is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them.**

* So in Maine, in an action of assumpsit for a quantity of limestone, the court said:

"In general, the delinquent party is holden to make good the loss occasioned by its delinquency. But his liability is limited to direct damages which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of

"Direct" here used synonymously with "Proximate" as used in ante § 111 (122)
"Direct" contradistinguished from "Proximate" & "natural" see post § 230.

proof and deducible from the non-performance, are not allowed; and if the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions,—he fails in social duty if he omits to do so. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks, of an equal quality and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built."[1] **

* So in trespass in Massachusetts, it appearing that the defendant had broken down the plaintiff's fence in November, but that the plaintiff did not repair the breach till May, in consequence of which cattle got in and destroyed the crop of the next year, and the claim being for the loss of the subsequent year's crop, as well as the expense of repairing the fence, the Supreme Court said:[2]

"In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after

[1] Miller *v.* Mariner's Church, 7 Me. 51. The same language is held in Iowa, Davis *v.* Fish, 1 Greene (Ia.) 406.

[2] Loker *v.* Damon, 17 Pick. 284, per Shaw, C. J.

notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that, as the trespass consisted in removing a few rods of fence, the proper measure of damages was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence."[1] **

And the rule is applied in equity as well as at law.(a)

§ 202. **Reason of the rule.**—It is frequently said that it is the *duty* of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequences which the plaintiff, acting as prudent men ordinarily do, can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as *remote*. In this view the doctrine would rest on the intervention of the plaintiff's will as an independent cause.(b) *Ad hoc* he is not damaged by the defendant's act, but by his own negligence or indifference to consequences. Thus, in a case in New Jersey, the cause of action was the taking by the defendant of the plaintiff's flat from his ferry, whereby the plaintiff was prevented from crossing a river, and obliged to leave his horses and wagon on the bank to go in search of the flat. In his absence the horses ran into the river and were drowned; but it was held that the plaintiff could not recover for their loss, which was caused by his own negligence in leaving them unsecured.(c) And where a lease contained a covenant to furnish a certain amount of power, and less was furnished,

[1] And see Thompson *v.* Shattuck, 2 Met. 615.

(a) Taylor *v.* Read, 4 Paige 561.

(b) The use of the word *duty* is common in the cases, and it is almost impossible to avoid it; but it should be clearly understood that its use is loose; there being no corresponding *right* in the defendant.

(c) Gordon *v.* Butts, 2 N. J. L. 333.

it was held that loss caused by an attempt to manufacture with inadequate power was remote.([a])

So too the loss of crops is not the proximate result of deprivation of an animal by which the owner intended to harvest the crops; consequently in an action for deprivation of the animal no compensation can be recovered for loss of the crop.([b]) So where through deprivation of the use of an agricultural machine or through a defect in it the owner loses his crops, such loss is too remote, and he cannot recover compensation for it.([c]) And loss of crops from loss of service of a servant or slave is too remote to be compensated in an action founded on the loss of service.([d]) It is, however, held that where no other assistance can be procured the plaintiff may recover compensation for the loss.([e])

Where, in a lease of a dairy farm for five years, the lessor agreed to put the barns on the premises in a good state of repair, but neglected to do so; it was held that the lessee could recover the amount it would cost to put the barns in repair, but not the damage sustained by injuries to the cows and young cattle, the increase of food required and the decrease of produce resulting from the state of the barns; these damages being "altogether too remote and contingent."

[1] Dorwin *v.* Potter, 5 Denio, 306

([a]) Manhattan S. W. *v.* Koehler, 45 Hun 150.

([b]) Sledge *v.* Reid, 73 N. C. 440; Jackson *v.* Hall, 84 N. C. 489; Luce *v.* Hoisington, 54 Vt. 428; 56 Vt. 436.

([c]) Fuller *v.* Curtis, 100 Ind. 237; McCormick *v.* Vanatta, 43 Ia. 389; Osborne *v.* Poket, 33 Minn. 10; Brayton *v.* Chase, 3 Wis. 456. It is held in Louisiana that on failure to deliver a sugar mill the purchaser may recover compensation for the crop *necessarily* lost. Goodloe *v.* Rogers, 10 La. Ann. 631.

([d]) Prosser *v.* Jones, 41 Ia. 674; Usher *v.* Hiatt, 18 Kas. 195; Johnson *v.* Courts, 3 H. & McH. 510; Peters *v.* Whitney, 23 Barb. 24.

([e]) Hobbs *v.* Davis, 30 Ga. 423; Houser *v.* Pearce, 13 Kas. 104.

So in an action brought on a covenant to keep one-half of a mill-dam in repair it was held in Massachusetts that the plaintiff, whose duty it was to repair the other half, could not recover the loss of profits in his business through the dam falling out of repair.[1] The lessor of a mill covenanted to repair a dam, and if he did not the lessee had the right to make repairs at the expense of the lessor. In an action by the lessee for breach of the covenant of repair it was held that loss of profits caused by the disrepair of the dam was too remote."([a]) The defendant pulled down the plaintiff's fence; it was held that the expense of keeping intruders out of the plaintiff's unfenced enclosure was "too remote."([b]) The plaintiff in each case should have avoided the loss by repairing.

§ 203. Rule sometimes results in enhancing damages.— The observance of the rule by the plaintiff will not always have the effect of reducing the damages; it may even enhance them. Thus, where one has hired a horse, and by improper treatment returned him in an injured condition, and the owner employs a proper veterinary surgeon, who treats the animal according to his best judgment, but is unable to cure him, the hirer will be liable for the full value, although such treatment was in fact improper and contributed to the horse's death.([c]) And so, if a passenger in a coach, by reason of a peril arising from an accident for which the proprietors are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom, and thereby injures himself, the pro-

[1] Thompson *v.* Shattuck, 2 Met. 615.

([a]) Fort *v.* Orndoff, 7 Heisk. 167.
([b]) Krueger *v.* Le Blanc, 62 Mich. 70.
([c]) Eastman *v.* Sanborn, 3 All. 594.

prietors are responsible in damages, though he might have retained his seat in safety.(a)

§ 204. **Different from the rule of contributory negligence.** —The application of the doctrine of contributory negligence and of that of avoidable consequences often produce results that closely resemble each other; but there is a distinction between the two. Contributory negligence defeats the action itself. The rule of avoidable consequences can never produce this result, as it cannot be applied until a cause of action, which in any event will entitle the party injured to nominal damages, has arisen.(b) The rule, therefore, is really a rule of limitation upon the plaintiff's recovery. Nor is it properly to be regarded as a species of mitigation of damages. This relates to the defendant and generally to the character of his acts; *e. g.*, that a tort was not malicious; that, after committing a trespass, he repaired the wrong as far as possible. But a reduction of the *plaintiff's* damages by any such particulars as flow from his own imprudent act, or omission to act *after the wrong has been committed*, constitute a distinct class of remote damages in the strict sense of the

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(a) Jones *v.* Boyce, 1 Stark. 493; Ingalls *v.* Bills, 9 Met. 1; and see, for an interesting discussion of the principles involved, Wilson *v.* Newport Dock Co., 4 H. & C. 232.

(b) Lawson *v.* Price, 45 Md. 123, 137. This distinction is made very clear by the fact that in such a case as that of personal service, a plea *in bar of the action* that by reasonable diligence plaintiff might have procured employment at a compensation equal to that agreed to be paid him, is bad. Armfield *v.* Marsh, 31 Miss. 361 (1856). He is entitled to nominal damages, at any rate. It is true that the case of Franklin *v.* Smith, 21 Wend. 624, does not support this view. There it was held that, in an action against a notary for omission of notice of protest, where it appeared that the plaintiff need not have sustained any loss with ordinary attentions to the case, the notary was not liable. But the distinction between the rule of contributory negligence and of avoidable consequences does not seem to have been called to the attention of the court.

word; of damages which flow from the illegal act, but for which the law gives no redress.

§ 205. **The rule of general application.**—The rule applies, both in contract and tort, and illustrations may be drawn from every branch of the law. It should be noticed, however, that while of very general range, the circumstances of many contracts forbid its application. Thus in an ordinary contract for manufacture and delivery of chattels, when a vendor fails to deliver, the usual rule is the difference between the contract and market price, and this, says Sharswood, J.,([a]) is "for the evident reason that the vendee can go into the market and obtain the article contracted for at that price." This would be an application of the rule of avoidable consequences, and it follows that when it appears that an article of the same quality cannot be procured in the same market, the true measure is the actual loss in manufacture by having to use an inferior article, or the loss on any sub-contract. But even here, the rule of avoidable consequences cannot be lost sight of; the court adds: "We do not mean to say that if he undertakes to fill his own contracts with an inferior article, and in consequence such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment." ([b])

In an action for failure to deliver certain articles, according to contract,([c]) the court said, that if the article to be furnished could be purchased in the market, the market price furnishes the rule; but, even if it could not, still "the party who suffers from a breach of contract must so act as to make his damage as small as he reasonably can."

([a]) McHose *v.* Fulmer, 73 Pa. 365 (1873). ([b]) Ib., p. 367.
([c]) Parsons *v.* Sutton, 66 N. Y. 92.

It was further held, where the articles were offered to the purchaser after the time for delivery fixed in the contract, that this offer excluded his claim for damage which accrued subsequently, the court saying: "Under such circumstances the defendants could not refuse to take the paper offered, and throw upon the plaintiffs all the remote subsequent damage which they claim to have sustained. They had the right to refuse to take this paper after the second day of June. But they could not refuse to take it and then claim special damages because they could not get it." This would lead to the conclusion that often the reason why the plaintiff is confined to the market value is because his natural course was to go into the market and make his loss good.([a])

Where plaintiff telegraphed an acceptance of an offer to buy cotton of him, on finding that the message had not been sent, it was held that he should have taken, within a reasonable time, steps to prevent unnecessary loss. "If he had the cotton to deliver, or had arranged to procure it for delivery, he should have made an effort to sell it; and if he made future contracts for its purchase, for the purpose of fulfilling his contract of sale, he was not authorized to extend them from month to month on a declining market, and fasten the loss on defendant."([b])

In Baldwin *v.* U. S. Tel. Co.([c]) plaintiff delivered a message to a telegraph company, requesting his agent to telegraph back information as to petroleum wells, the property of the plaintiff. Plaintiff informed the operator that unless an answer was received he would sell at a certain price. Receiving no reply, he sold at the offer. It was held that he could not hold the telegraph company

([a]) See chapter on Sales.

([b]) Western Union Telegraph Co. *v.* Way, 83 Ala. 542.

([c]) 45 N. Y. 744.

for the difference between this price and a higher market value, the court giving, among other reasons, that the notice to the operator did not relieve the plaintiff of the ordinary duty to take all reasonable measures to diminish damages.

Scott *v.* Boston & N. O. S.S. Co.(a) was a case against a carrier for non-delivery, where the plaintiff lost a sub-contract at an increased price. The case seems to be rested by the court on the absence of notice, but it is also said that "it would ordinarily be unjust" to make loss of profits in such a case a basis of damages, because the plaintiff can generally protect himself from loss by a purchase of the commodity at the market. "He cannot be permitted to recover of the defendant for losses which by reasonable effort he might have avoided."

So a purchaser (giving notice of the intended use) can, for failure to deliver machinery, recover for damages for his mill being kept idle *till he could replace himself in the market.*(b) In Hinde *v.* Liddell,(c) an action for breach of contract to deliver shirtings, it appeared that the plaintiff had bought the best substitute he could get after the defendant's breach, so as to comply with a sub-contract he had entered into. Although this substitute was more expensive and of better quality, it was held that he could recover the difference between the contract price and the price he had paid for these shirtings, Blackburn, J., saying: "But there was no market for this particular description of shirtings, and therefore no market price; in such a case the measure of damages is the value of the thing at the time of the breach of the contract, and that must be the price of the best substitute procurable."

In True *v.* International Telegraph Company,(d) an

(a) 106 Mass. 468.
(b) Benton *v.* Fay, 64 Ill. 417.
(c) L. R. 10 Q. B. 265.
(d) 60 Me. 9.

action against a telegraph company for failure to deliver a message which accepted an offer to sell plaintiffs some corn, the measure of damages was held to be the difference between the price named and that which the plaintiff would have been obliged to pay at the same place, in order, *by due and reasonable diligence after notice of the failure* of the telegram, to purchase the like quantity and quality of the same species of merchandise.

And so in an action against a railroad company for breach of contract to take water from a water-station to be constructed by plaintiff, it was held that the plaintiff could not, because the railroad had abandoned the contract, suffer the property to go to decay and become utterly useless, so as to hold the defendant for the original cost and value. The plaintiff's course was to sell the materials for the best price obtainable, or to put them to some use to which they were adapted.([a]) In Grau *v.* McVicker,([b]) a case of a lease of a theatre to commence at a future time; before the time came, the lessor notified the lessee that he would not take the theatre. It was held that this refusal was a breach,([c]) entitling the lessor to sue at once, and that the measure of his damages would be the stipulated rental, less anything which he might have made or did make by letting the premises meantime. In Campbell *v.* Miltenberger ([d]) the court refused to allow large damages for injuries resulting from the defendant's having put up a fence improperly, holding that the plaintiff, who had stood by for seven years seeing the fence slowly go to ruin, could only recover the amount which it would have cost to put the fence in a proper

([a]) New Orleans J. & G. N. R.R. Co. *v.* Echols, 54 Miss. 264.
([b]) 8 Biss. 13.
([c]) Following Hochster *v.* De la Tour, 2 E. & B. 678.
([d]) 26 La. Ann. 72.

condition when the discovery of the defect was first made.

Mather *v.* Butler County (a) was an action for furnishing materials and work and labor on defendant's courthouse. The defendant had a counterclaim for damages caused by defective work. An instruction was refused to the effect that if defendant could have protected itself from such damages, at a moderate expense and by ordinary efforts, it was bound to do so, and could charge the plaintiff only for such expense and efforts, and for damages which would not be prevented by such efforts and at such expense. *Held* that it should have been given. Hamilton *v.* McPherson (b) was a case against a carrier for injury of goods through delay. It was held in accordance with the general rule that the plaintiffs could not recover for the injury, if it were caused by the neglect on their part to take ordinary precautions to prevent damages from the breach of defendant's contract. Where the injury complained of was the breach of a contract to make plaintiff sole agent for the sale of machinery, and evidence was offered to the effect that the agent of those having control of the machines offered after the breach to let the plaintiff sell them, it was held that this tended to show that plaintiff was not damaged at all.(c)

In a case, where, through the defendant's negligence, an endowment policy lapsed, it was said to be the plaintiff's duty to use proper care and to adopt all reasonable means to prevent further damage, either by reinstating himself with the company, or by reinsuring, and that the defendant would not be liable for loss the plaintiff could have prevented, the court saying: "But the law makes it incumbent upon a person for whose in-

(a) 28 Ia. 253.
(b) 28 N. Y. 72.
(c) Beymer *v.* McBride, 37 Ia. 114.

jury another is responsible, to use ordinary care and take all reasonable measures within his knowledge and power to avoid the loss and render the consequences as light as may be; and it will not permit him to recover for such losses as by such care and means might have been prevented." The court, however, pointed out that the plaintiff could show a good excuse for not reinsuring.[a] In actions to recover damages for breach of contract for the manufacture and sale of certain milk-coolers, it appeared that the defect complained of was simply in the pans used; *held* that the measure of damages was simply the expense of substitution of perfect pans.[b] In an action for breach of contract, where the plaintiff had materials left on his hands, the court said that damages should not be allowed the claimant for loss or injury to his materials, which he might have prevented by the exercise of reasonable care and prudence.[c]

And so it has been decided that a passenger should procure another conveyance on a railroad's failure to perform the contract of carriage.[d] And the rule has been applied to a continuing contract to sell books by subscription,[e] to contracts to furnish board and lodging,[f] to contracts of hiring,[g] to contracts by carriers,[h] to contracts to keep premises leased in repair,[k] and to many other cases.[l] Some particular classes of contracts will now be considered.

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[a] Grindle *v.* Eastern Express Co., 67 Me. 317.
[b] N.Y. State Monitor Milk Pan Co. (Limited) *v.* Remington, 109 N.Y. 143.
[c] U. S. *v.* Smith, 94 U. S. 214.
[d] Indianapolis, Bloomington & Western Ry. Co. *v.* Birney, 71 Ill. 391.
[e] Warren *v.* Stoddart, 105 U. S. 224 (1881).
[f] Wilson *v.* Martin, 1 Den. 602; Spencer *v.* Halstead, lb. 606.
[g] Heavilon *v.* Kramer, 31 Ind. 241.
[h] Cincinnati & Chicago A. L. R.R. Co. *v.* Rodgers, 24 Ind. 103.
[k] Flynn *v.* Trask, 11 All. 550.
[l] Frost *v.* Knight, L. R. 7 Ex. 111; Beymer *v.* McBride, 37 Ia. 114.

§ 206. **Contracts for personal services.**—When a servant, or other employee, is discharged without lawful cause, he will, acting with ordinary prudence, seek other employment, and the amount which he earns in this way, or which he might have earned had he used reasonable efforts, will be allowed in reduction of the damages given for his discharge.[a] And a plaintiff who receives as much in the new employment as he would have received in the old one, is, on the principles already stated, still entitled to nominal damages.[b] The rule does not mean that the party injured is bound to take any employment that offers, nor to abandon his home and place of residence to seek other employment, but only to use reasonable diligence in procuring employment of the same or similar kind.[c]

§ 207. **Employment of different kind or grade.**—It is well established that the plaintiff is not compelled to accept employment of an entirely different sort.[d] "The defendants had agreed to employ the plaintiff in super-

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[a] Walworth *v.* Pool, 9 Ark. 394 (1849); McDaniel v. Parks, 19 Ark. 671 (1858); Sutherland *v.* Wyer, 67 Me. 64; Hoyt *v.* Wildfire, 3 Johns. 518; Shannon *v.* Comstock, 21 Wend. 457 (1839); Howard *v.* Daly, 61 N. Y. 362; Hendrickson *v.* Anderson, 5 Jones L. 246; King *v.* Steiren, 44 Pa. 99; Gordon *v.* Brewster, 7 Wis. 355. And as the plaintiff cannot enhance his damages by lying idle, so it has been said he cannot make a claim for services by performing his side of the contract after breach by defendant. Thus, in a case of employment to do work and labor in cleaning and repairing paintings, when defendant notified plaintiff not to go on, but the latter nevertheless completed the work, it was held by the Supreme Court of New York that he had no right to increase his claim in this way. Clark *v.* Marsiglia, 1 Denio 317.

[b] Williams *v.* Chicago Coal Co., 60 Ill. 149.

[c] Williams *v.* Chicago Coal Co., 60 Ill. 149; Costigan *v.* Mohawk & H. R.R. Co., 2 Den. 609; Howard *v.* Daly, 61 N. Y. 362; Fuchs *v.* Koerner, 107 N. Y. 529. The case of Huntington *v.* Ogdensburgh & L. C. R.R. Co., 33 How. Pr. 416, seems in conflict with this general limitation of the rule.

[d] Leatherberry *v.* Odell, 7 Fed. Rep. 641; Fuchs *v.* Koerner, 107 N. Y. 529.

intending a railroad from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence to engage in business of the same character with that in which he had been employed by the defendants."[a] So in a case where the manager of a bank was wrongfully discharged, the court said: "No doubt the position of manager of a bank was not to be got every day, and that was to be considered."[b] Nor is a discharged agent or servant bound to accept employment of greatly inferior sort than that from which he was discharged. Thus, where a mate was wrongfully discharged, and was able to get employment only before the mast, it was held that he was not bound to accept such employment; and what he had in fact earned before the mast was not deducted from the wages due him by his contract.[c] And the plaintiff may in certain cases have a right to reject employment suitable in kind and grade. Thus the plaintiff's minor son, having been wrongfully discharged by the defendant, it was held that the father was not bound to accept for his son the first employment that was offered, but had a right to look for other things than mere wages, namely, for the material and moral welfare of his son.[d]

§ 208. **Duty to seek employment does not arise in all contracts.**—The duty to seek employment, too, is dependent upon the original contract being one of employment or hiring. It is not applicable to every species of con-

[a] Costigan *v.* Mohawk & H. R.R. Co., 2 Den. 609.

[b] Hartland *v.* General Exchange Bank, 14 L. T. Rep. 863.

[c] Sheffield *v.* Page, 1 Sprague, 285; but *quære*, as to the last point: if he actually earned it, since what he recovers is the value of the contract, *i. e.*, the value of his whole time, must not all actual earnings be deducted?

[d] Strauss *v.* Meertief, 64 Ala. 299.

tract. This question has been considered by the Supreme Court of Pennsylvania (a) in the case of the lease of a farm when possession was refused. In an action by the lessee the lessor was permitted to prove that the lessee had been engaged in a totally different occupation from farming, which had been more profitable to him. The Supreme Court of Pennsylvania held this to be error, on the ground that ordinary contracts of hiring and contracts for the performance of some specific undertaking cannot be governed by the same rule; that in the one case the party can earn no more than the wages, and if he gets that his loss will be but nominal; whereas, in the other case, the loss of the party is the loss of the benefit of the contract. To apply the doctrine of avoidable consequences to such cases would "involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime." Besides this, in analogy with the principle of proximate cause, it was said that whatever is to have the effect of lessening the plaintiff's damages should have some proximate relation to the contract itself.

§ 209. **Landlord's agreement to repair.**—In a suit by tenant against landlord for breach of agreement to repair, the general rule is that the measure of damages is the expense of the repairs; for these the plaintiff, being in possession of the premises, may and should make. And therefore, if a landlord fails to make repairs as agreed before a certain date, the damages are to be assessed as of that date. The tenant cannot recover a claim paid by him to another party for damages subsequently caused by the defective condition of the premises.(b) When

(a) Wolf *v.* Studebaker, 65 Pa. 459 (1870).

(b) Sparks *v.* Bassett, 49 N. Y. Super. Ct. 270 (1883).

the landlord agrees to furnish timber to keep old fences in repair and pay the tenant for any new rails made and put up necessary for repairs, and the tenant could have made the fences good and at trifling expenditure, it was held that he should have done so, and not having taken the proper steps, could not recover for subsequent injury therefor owing to want of fences.[a] And so where the landlord covenanted to repair a mill-dam, and failed to do so, it was the duty of the tenant to repair it, and he could not neglect to do so and then recover for injury to the machinery caused by its inactivity and for loss of custom.[b] In a case in Missouri [c] the lessor covenanted to build a wall on leased premises, and it was held by the Supreme Court of that State that the lessee's measure of damages in such a case was not the difference in rental value, but the cost of rebuilding the wall and damages for the period of delay. The tenant cannot abandon the premises and then claim damages for the whole loss. And such is the general rule.[d] In the case of a covenant to repair by a landlord, it has been held, however, by the New York Court of Appeals that the tenant has an option either to make the repairs and

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[a] Parker *v.* Meadows, 86 Tenn. 181.

[b] Fort *v.* Orndorff, 7 Heisk. 167. In this case, as well as the preceding, a right to repair was reserved to the tenant by contract, but the cases were decided upon the general principle under discussion. In the case of a mill-dam where the ownership on the two banks of a stream is in different persons, an express stipulation may (as in Fort *v.* Orndorff, *supra*) give the tenant a right to make repairs on premises outside the lease which he would otherwise not have. In such a case as Parker *v.* Meadows, above, the stipulation would oblige the landlord to pay under the contract what otherwise the tenant might compel him to pay outside the contract by way of damages for its breach.

[c] Fisher *v.* Goebel, 40 Mo. 475 (1867).

[d] Penley *v.* Watts, 7 M. & W. 601; Middlekauff *v.* Smith, 1 Md. 329; Walker *v.* Swayzee, 3 Abb. Pr. 136; Keyes *v.* Western Vt. Slate Co., 34 Vt. 81.

charge the expense to the landlord, or to hold the latter for the full amount of the damage.[a] In a subsequent case[b] the court (Grover, J.) approved this rule, but said: "There may be exceptions to this rule. In cases where the requisite repairs are trifling, and the damage by not making them is large, I think it is the duty of the tenant to make them and charge the landlord with the cost."[c] This would make the doctrine of avoidable consequences the exception, while the general rule governing covenants to repair would be that the tenant had a choice whether to repair or not.

Two Alabama cases seem at variance with each other on the subject of the general rule, that where a landlord, who is under obligation to repair fences, fails to do so, it is the tenant's duty to make them, and that if he fails he cannot hold the landlord responsible for consequential damages, such as the depredations of cattle.[d] In the first of these cases the decision is expressly rested on the ground that the labor and expense which the repairs would have required were of an extraordinary character, and that the diligence required "did not extend so far," which seems to recognize the rule of avoidable consequences. But in the second case the court held that the tenant had the right to rely on the promise of the landlord to make the repairs, and that on a breach the landlord was liable for damages by depredations.

§ 210. **Tenant's agreement to make repairs.**—The case of a breach by a tenant presents a different question. The

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[a] Myers *v.* Burns, 35 N. Y. 269 (1866); Hexter *v.* Knox, 63 N. Y. 561 (1876).

[b] Cook *v.* Soule, 56 N. Y. 420 (1874).

[c] Citing Miller *v.* Mariners' Church, 7 Me. 51; Loker *v.* Damon, 17 Pick. 284.

[d] Vandegrift *v.* Abbott, 75 Ala. 487 (1883); Culver *v.* Hill, 68 Ala. 66 (1880).

landlord is out of possession, and therefore in general is not in a position to make repairs himself. Usually his measure of damages will be the injury to the reversion, and the rule of avoidable consequences will not apply.[a]

§ 211. **Agreement to make improvements.**—In case of a breach by a tenant of an agreement to make improvements, the measure of damages has been held to be the reasonable expense of making the improvements after the termination of the lease and the difference in rental value during the period of delay.[b] Where the plaintiff leased premises to defendant, no term of demise being stated, and no rent being reserved, the defendant agreeing to sink an oil well, and to pay three dollars a cord for wood standing in the lot, and a right of re-entry being reserved; for breach of covenant the jury gave what it would cost to sink a well. *Held*, that nominal damages only were recoverable.[c] The court says that the rule of the English courts that in covenant by lessor for non-repair under an unexpired lease, the proper measure of damages is not the amount required to put the premises in repair, but the injury to the reversion "tends to support the conclusion that the rule of damages adopted in this case was erroneous." [d]

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[a] Turner *v.* Lamb, 14 M. & W. 412; Payne *v.* Haine, 16 Id. 541; Smith *v.* Peat, 9 Ex. 161; Doe *v.* Rowlands, 9 C. & P. 734.

[b] Raybourn *v.* Ramsdell, 78 Ill. 622 (1875).

[c] Chamberlain *v.* Parker, 45 N. Y. 569.

[d] This decision seems based on the idea that "the loss or gain in sinking a well was wholly the defendant's" (p. 573), and the court distinguishes the case from that of an agreement by defendant *for a consideration* to build a house for plaintiff, when, on breach, the value of the house would measure the damages. But unless the contract is unconscionable, is not the consideration to be assumed to be a fair equivalent for the covenant? Under the rule in this case, it would seem as if there would have to be an inquiry in each case, how far the consideration was an equivalent for the covenant.

§ 212. **Failure to furnish freight or cargo.**—For failure to furnish cargo, the measure of damages is the contract price, less the net earnings of the vessel, during the period of the charter.[a]

And so when defendant agreed to hire a barge, for freighting, and subsequently abandoned it, the plaintiff notified him that unless he used the barge, he would do so himself, and credit him with all net earnings. The barge having been used in this way, it was held that plaintiff was entitled to recover the contract price, less such net earnings.[b] And the rule is the same in cases of land-carriage.[c]

§ 213. **Reparation offered by defendant.**—The question has arisen in the case of contracts for personal services, whether after a breach, the duty of the plaintiff to seek new employment obliges him to accept employment if offered by the employer who has discharged him. In Bigelow *v.* The American Forcite Powder Manufacturing Company[d] the New York Supreme Court held (Daniels, J., dissenting) that the plaintiff must reduce damages in this way; in another case,[e] however, where the defendant offered to continue the employment *at a less rate*, it was held that this did not go to reduce the damages, the distinction being that under the circumstances of the case, if the plaintiff had accepted the new offer, it would have been a modification of the original contract by consent,

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[a] Smith *v.* McGuire, 3 H. & N. 554 (1858); Murrell *v.* Whiting, 32 Ala. 54; Utter *v.* Chapman, 38 Cal. 659 (1869); Bailey *v.* Damon, 3 Gray 92; Dean *v.* Ritter, 18 Mo. 182 (1853); Shannon *v.* Comstock, 21 Wend. 457; Heckscher *v.* McCrea, 24 Wend. 304; Ashburner *v.* Balchen, 7 N. Y. 262.

[b] Johnson *v.* Meeker, 96 N. Y. 93.

[c] Dunn *v.* Daly, 78 Cal. 640.

[d] 39 Hun 599.

[e] Whitmarsh *v.* Littlefield, 46 Hun 418.

which would have precluded him from recovering any damages at all.([a])

And so in Havemeyer *v.* Cunningham,([b]) a case between vendor and vendee, when, after failure to deliver, the defendant offered to sell to plaintiffs at a price below the market value on the day fixed for delivery, the same court said, "The defendants could not relieve themselves from the consequences of their refusal to deliver, by an offer to sell at a higher price, although less than the subsequent market value. Such an offer, if accepted by the plaintiffs before the time of performance arrived, might have exposed them to the charge of having abandoned the first contract." In another case already cited,([c]) the question came before the New York Court of Appeals in a different way. There, after a failure to deliver, the vendor offered to let the vendee have the goods, and it was held that while the vendee might refuse to receive them, he could not refuse and then claim special damages because he could not get them.

In a case in Texas,([d]) where plaintiff agreed to furnish transportation with wagons and trains, but on finding that there were no goods of defendant's to transport, refused to take other goods offered him by defendant's agent, it was held on demurrer that he could not maintain an action for the entire amount of dead freight. In Illinois, it has been held, in an action of trespass resulting in eviction from leased premises, that a lessor can show that he has offered other premises, in lieu of those he had agreed to lease, on discovering his inability to give possession.([e])

([a]) Parsons *v.* Sutton, 66 N. Y. 92 (1876).
([b]) 35 Barb. 515.
([c]) Parsons *v.* Sutton, 66 N. Y. 92 (1876).
([d]) Heilbroner *v.* Hancock, 33 Tex. 714.
([e]) Dobbins *v.* Duquid, 65 Ill. 464.

§ 214. **Actions of tort.**—The rule is of frequent application in actions for personal injury. In all such cases, as well as in actions for injury to animals, the party injured will in the exercise of ordinary prudence take reasonable precautions to avoid the consequences of the injury, by the employment of medical aid, etc. Where he omits to take such steps, he cannot recover for the consequences which come from his own omission.[a] Among the numerous other cases of tort, in which the rule has been applied, may be mentioned the following: trespass by land-owner against railroad for digging ditches;[b] action of deceit for sale of an impotent bull;[c] action for seizure of furniture;[d] for obstruction of mill-race;[e] for interference with water-power;[f] for setting fire to a prairie,[g] or to woods;[h] for trespass by cattle;[k] for negligence of a telegraph company;[l] against a public officer.[m]

In replevin, where the defendant is liable on outstanding contracts for ice, which he is obliged to fulfil, he cannot,

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[a] Smith *v.* Baker, 22 Blatch. 240; Allender *v.* Chicago, R. I. & P. R.R. Co., 37 Ia. 264; French *v.* Vining, 102 Mass. 132; Bardwell *v.* Jamaica, 15 Vt. 438. In Crete *v.* Childs, 11 Neb. 252, it was held that an instruction that if the plaintiff employed such persons to attend her "as she *thought* competent, and in good faith," she would not be responsible for contributing to the damages, was erronous.

[b] Kansas Pacific Ry. Co. *v.* Mihlman, 17 Kas. 224.

[c] Maynard *v.* Maynard, 49 Vt. 297.

[d] Luse *v.* Jones, 39 N. J. 707.

[e] Lawson *v.* Price, 45 Md. 123.

[f] Decorah Woolen Mill Co. *v.* Greer, 49 Ia. 490.

[g] Waters *v.* Brown, 44 Mo. 302.

[h] Bevier *v.* Delaware & H. C. Co., 13 Hun 254 (1878); Hogle *v.* New York Central & H. R. R.R. Co., 28 Hun 363.

[k] Little *v.* McGuire, 38 Ia. 560; 43 Ia. 447.

[l] Marr *v.* Western Union Tel. Co. 85 Tenn. 529.

[m] State *v.* Powell, 44 Mo. 436. For other cases see Terry *v.* The Mayor, 8 Bos. 504 (1861); Priest *v.* Nichols, 116 Mass. 401.

it is said, recover any extraordinary damages he has had to pay for a breach of these contracts, for "it would be easy for him to replace the ice taken, by ice to be purchased, for which he would be obliged to pay only the fair value, which will be precisely what he will receive."[a]

In New York,[b] instead of giving as the measure of damages in trover for stocks the value at the time of the conversion or the highest value between the conversion and the trial, the rule is the value a reasonable time after notice of the conversion. Rapallo, J., in that case limited the recovery by saying that the damages recoverable are for consequences "which a proper degree of prudence on the part of the complainant would not have averted." In Wright *v.* Bank of the Metropolis,[c] where the defendant converted stock which the plaintiff had pledged with him, Peckham, J., said: "His (*i. e.*, the defendant's) duty is in each case to replace the stock upon demand, and in case he fails so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty, it seems to me, is founded upon the general duty which one owes to another, who converts his property under an honest mistake, to render the resulting damages as light as it may be reasonably within his power to do." As already stated, the reason of the rule given by Rapallo, J., seems preferable to this.

§ 215. **Expenses of avoiding consequences recoverable.** —The reasonable expenses of avoiding the consequences of the defendant's wrong are recoverable, and when the plaintiff fails to take proper steps, he is limited in his recovery on this head to what the cost of such steps would have been.[d] Thus in an action against an officer for a

[a] Washington Ice Co. *v.* Webster, 62 Me. 341.

[b] Baker *v.* Drake, 53 N. Y. 211. [c] 110 N. Y. 237, 245.

[d] Borries *v.* Hutchinson, 18 C. B. N. S. 445; Indianapolis B. & W. Ry. Co. *v.* Birney, 71 Ill. 391; Kansas Pacific Ry. Co. *v.* Mihlman, 17 Kans. 224 (1876); Shaw *v.* Cummiskey, 7 Pick. 76; Sherman *v.* Fall River Iron Works Co., 2

false return, in certifying that he had left a true copy of a notice to appear for examination, that the person served might thereby avoid the issuing of an execution against his body (under the poor debtor's act), when in fact the place of examination was omitted in the copy, it was held that the plaintiff should have made inquiries of the justice or the officer, and ascertained the place, and that the only damages he could recover would be an adequate remuneration for this inconvenience.[a] When a railroad is under a statutory duty to erect cattle-guards, plaintiff recovers not only for damages to crop destroyed by cattle, but the expenses of a reasonable effort to protect his crop.[b] On a contract to furnish machinery for a mill, the owner may, if the machinery proves defective, recover a sum of money sufficient to remedy the defects, together with a reasonable compensation for its use during the period of delay.[c] And on breach of a contract by a railroad company with owner of lots to build a bridge over its road, the measure of damages is not the difference between the value of the lots when sold and their value had the bridge been constructed, but the cost of making such a bridge, including reasonable compensation for time and labor, and perhaps whatever damages might have been incurred during the time required to build it.[d]

So the expense of perfecting the title of land may be recovered by the grantee in an action for breach of covenant of warranty.[e] In Kelsey *v.* Remer,[f] an action on

All. 524; Emery *v.* Lowell, 109 Mass. 197; Jutte *v.* Hughes, 67 N. Y. 267; Hoffman *v.* Union Ferry Co., 68 N. Y. 385; Worth *v.* Edmonds, 52 Barb. 40; Comstock *v.* New York C. & H. R. R.R. Co., 48 Hun 225; Lloyd *v.* Lloyd, 60 Vt. 288.

[a] Wright *v.* Keith, 24 Me. 158.

[b] St. Louis & S. F. Ry. *v.* Ritz 33 Kas. 404.

[c] Strawn *v.* Cogswell, 28 Ill. 457 (1862); Phelan *v.* Andrews, 52 Ill. 486 (1869).

[d] St. Louis J. & C. R.R. Co. *v.* Lurton, 72 Ill. 118 (1874).

[e] See the chapter upon Real Covenants. [f] 43 Conn. 129.

a covenant against incumbrances, an attaching creditor recovered judgment, but levied his execution improperly. The plaintiff, having paid off the judgment in good faith, believing, and having reason to believe, that otherwise execution would issue, it was held that he acted with reasonable prudence and care in regard to the interests of the defendant, and the amount paid should be the measure of damages, there being no claim that it was greater than the value of the land. So a plaintiff can show what he has had to pay a third person to do work the defendant agreed to do.([a]) In James *v.* Hodsden ([b]) it was held that the plaintiff, in assumpsit to recover back the consideration paid for an interest in a patent-right fraudulently sold him by defendant, could recover what he paid to compromise certain notes which he had given the defendant, although he could have defended them on the ground of failure of consideration. It was said that he was not obliged to follow them about to different courts and spend his time and fortune, and that the court would presume he did the best he could. In an action against a railway company for breach of contract to fence in land in consideration of right of way granted to it, the measure of damages is the cost of erecting the fences, and it is no defence to such an action that the plaintiff has not erected the fences. On this point the Supreme Court of Indiana said : ([c]) " The position assumed by counsel that the plaintiff in such a case cannot recover unless he has done the acts which the defendant agreed to do, cannot be correct. Suppose the defendant has agreed to erect a house for the plaintiff, has received the consideration for which he agreed to

([a]) Clark *v.* Russell, 110 Mass. 133.
([b]) 47 Vt. 127.
([c]) Logansport, Crawfordsville & S. Ry. Co. *v.* Wray, 52 Ind. 578 (1876).

do the work, but failed to perform the contract on his part, and the plaintiff seeks to recover damages for the breach of the contract, is it the law that he cannot recover unless he has himself first erected the house? We think not." [a]

Where the plaintiff sold goods for delivery at a distant market on a certain date and shipped them by the defendant, which unreasonably delayed delivery, it was held that the plaintiff could recover the expense of a journey to the place of delivery to get the time of delivery extended, if that was a reasonable and necessary step for the purpose.[b] Where the defendant, by the wrongful construction of a water-pipe, caused water to flow into the plaintiff's cellar, the expense of a reasonable attempt to keep it out may be recovered.[c] Where the defendant wrongfully refused to allow the plaintiff's vessel to proceed through a certain channel, the only practicable means of reaching its port of destination, it was held that the plaintiff might recover the expense of unloading the cargo by lighters.[d] Where the defendant obstructed a river, and the plaintiff's vessel grounded upon the obstruction, the expense of getting off from and over the obstruction may be recovered.[e] Where defendant's wrongful act sunk the plaintiff's vessel, the expense of an attempt to raise her may be recovered from the defendant.[f] Where fire escaped through the defendant's negligence and burned the plaintiff's meadow,

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[a] Citing Lawton *v.* Fitchburg R.R. Co., 8 Cush. 230; Chicago & R. I. R.R. Co. *v.* Ward, 16 Ill. 522.

[b] Ohio & M. R.R. Co. *v.* Dunbar, 20 Ill. 623.

[c] Comstock *v.* New York C. & H. R. R.R. Co., 48 Hun 225.

[d] Buffalo B. S. C. Co. *v.* Milby, 63 Tex. 492.

[e] Benson *v.* Malden & M. G. L. Co., 6 All. 149.

[f] Sweeney *v.* Pt. Burwell H. Co., 17 Up. Can. C. P. 574.

the expense of reseeding the meadow may be recovered.([a])

The question turns, in each case, upon the reasonableness of the expense incurred. Thus expenses incurred by the plaintiffs in altering the works of their mill, in consequence of their apprehensions founded on a trespass of the defendant, which in fact caused nominal damages only, but was accompanied by threats on his part, the carrying out of which would render them necessary, were held too remote.([b]) In an action for false imprisonment on board a ship, the plaintiff cannot recover as special damage the expense he incurred in leaving the ship and taking his passage on board another, unless the imprisonment continued to the moment of his transshipment, and was the immediate cause thereof;[1] as if he acted to save his life, or from a reasonable regard to his safety.

§ 216. **Expense of following property.**—The plaintiff may recover the reasonable expense of attempting to find and retake property of which he has been wrongfully deprived.([c]) The same decision was reached in a case where the defendant had taken a horse and wagon belonging to the plaintiffs. They spent four days in searching for the horse and wagon, and incurred other expenses in the search. A verdict was given for the time spent, and expenses incurred in the pursuit. It was objected

[1] Boyce *v.* Bayliffe, 1 Campb. 58, where, to show how far attempts of the kind might be carried, if the necessary connection were not insisted on, Lord Ellenborough alluded to a case which used to be cited by Lord Alvanley, where the plaintiff complained of false imprisonment, *per quod* being confined on shore he lost a lieutenancy.

([a]) Pittsburgh C. & St. L. Ry. Co. *v.* Hixon, 110 Ind. 225.

([b]) Sibley *v.* Hoar, 4 Gray 222.

([c]) Hales *v.* London & N. W. Ry. Co., 4 B. & S. 66; Savannah F. & W. Ry. Co. *v.* Pritchard, 77 Ga. 412; Merrill *v.* How, 24 Me. 126; Parmalee *v.* Wilks, 22 Barb. 539; Sprague *v.* McKinzie, 63 Barb. 60; Hough *v.* Bowe, 51 N. Y. Super. Ct. 208; Miller *v.* Garling, 12 How. Pr. 203; Chase *v.* Snow, 52 Vt. 525.

that the damages were too remote; but the verdict was retained by the Supreme Court; and considerable stress was laid on the circumstance that the damages were occasioned by the wrongful act of the defendant.[1]

It has, however, been held in California, under the Code (and the decision would probably be followed in a court of common law), that in an action for the *recovery* of chattels (as distinguished from an action for conversion) the plaintiff cannot recover compensation for money spent in the pursuit of the property.([a])

§ 217. Expense of repairing or redressing the injury.—In an action for a personal injury, the plaintiff may recover the expense of nursing and medical attendance;([b]) and in an action for injury to a domestic animal, the owner may recover the expense of curing it.([c]) In an action

[1] Bennett *v.* Lockwood, 20 Wend. 223.

([a]) Kelly *v.* McKibben, 54 Cal. 192; Redington *v.* Nunan, 60 Cal. 632.

([b]) Phillips *v.* Southwestern Ry. Co., 4 Q. B. D. 406; Wade *v.* Leroy, 20 How. 34; Beardsley *v.* Swann, 4 McLean 333; Hanson *v.* Fowle, 1 Sawy. 539; Forbes *v.* Loftin, 50 Ala. 396; South & N. A. R.R. Co. *v.* McLendon, 63 Ala. 266; Larmon *v.* District, 16 D. C. (5 Mackey) 330; Pierce *v.* Millay, 44 Ill. 189; Chicago & A. R.R. Co. *v.* Wilson, 63 Ill. 167; Chicago *v.* Jones, 66 Ill. 349; Chicago *v.* Langlass, 66 Ill. 361; Sheridan *v.* Hibbard, 119 Ill. 307; Indianapolis *v.* Gaston, 58 Ind. 224; Muldowney *v.* Illinois C. Ry. Co., 36 Ia. 462; McKinley *v.* Chicago & N. W. Ry. Co., 44 Ia. 314; Kendall *v.* Albia, 73 Ia. 241; Tefft *v.* Wilcox, 6 Kas. 46; Kansas P. Ry. Co. *v.* Pointer, 9 Kas. 620; Missouri K. & T. Ry. Co. *v.* Weaver, 16 Kas. 456; Kentucky C. R.R. Co. *v.* Ackley, 87 Ky. 278; McMahon *v.* Northern C. Ry. Co., 39 Md. 438; Memphis & C. R.R. Co. *v.* Whitfield, 44 Miss. 466; Stephens *v.* Hannibal & S. J. R.R. Co., 96 Mo. 207; Cohen *v.* Eureka & P. R.R. Co., 14 Nev. 376; Metcalf *v.* Baker, 57 N. Y. 662; Sheehan *v.* Edgar, 58 N. Y. 631; Brignoli *v.* Chicago & G. E. Ry. Co., 4 Daly 182; Wallace *v.* Western N. C. R.R. Co., 104 N. C. 442; Oliver *v.* Northern P. T. Co., 3 Ore. 84; Pennsylvania & O. C. Co. *v.* Graham, 63 Pa. 290; Scott *v.* Montgomery, 95 Pa. 444; Lake Shore & M. S. Ry. Co. v. Frantz, 127 Pa, 297; Giblin *v.* McIntyre, 2 Utah 384; Goodno *v.* Oshkosh, 28 Wis. 300.

([c]) Atlanta C. S. O. Mills *v.* Coffey, 80 Ga. 145; Sullivan County *v.* Arnett, 116 Ind. 438.

for wrongful arrest (on the bond given at the time of suing out the writ), the expense of procuring release from arrest may be recovered.[a] Where a defective boiler was sold by the defendant and exploded, the owner may recover the expense of repairing the injury it caused.[b] Where a machine was delivered in an unfit condition to do the work it was purchased for, the purchaser was allowed to recover the expense of a reasonable but unsuccessful attempt to adapt it to the contemplated purpose;[c] and so, of course, of a successful attempt.[d] Where a vessel is injured by a collision, the expense of surveying the injuries[e] or of raising and repairing the vessel[f] may be recovered.

§ 218. **But only reasonable expense.**—But a plaintiff can only recover the reasonable expenses under the circumstances. Therefore a delayed passenger cannot recover the expense of a special train to avoid a slight delay. In Le Blanche *v.* London & N. W. Ry. Co,[g] the plaintiff took a train on the defendants' railway, by which he should, according to the time-table, have reached York in time to catch a train which would have brought him to his destination at half-past seven. The defendants' train arrived in York too late to allow him to catch that train, and by the next one he would not have reached his destination till 10. He took a

[a] Burnap *v.* Wight, 14 Ill. 301. But where the defendant suffered a wrongful distress for rent, he cannot recover the expense of setting aside the distress on certain parts of the property as exempt by law. Sturgis *v.* Frost, 56 Ga. 188.

[b] Phelan *v.* Andrews, 52 Ill. 486.

[c] Whitehead & A. M. Co. *v.* Ryder, 139 Mass. 366.

[d] Clifford *v.* Richardson, 18 Vt. 620.

[e] New Haven S. B. Co. *v.* Mayor, 36 Fed. Rep. 716.

[f] Williamson *v.* Barrett, 13 How. 101; Mailler *v.* Express P. Line, 61 N. Y. 312.

[g] 1 C. P. Div. 286.

special train, by which he arrived there at 9. He had no special engagements which required his presence. In the Common Pleas he was allowed to recover the expense of the special train, the court, however, admitting that a traveller could not under all circumstances take a special train, saying: "The question must always be whether it was a reasonable thing to do, having regard to all the circumstances. Where to take a special train is a reasonable thing to do, we are of opinion that it is a sufficiently natural result of the breach of contract to bring it within the legal rule." This decision was, however, reversed in the Court of Appeal, though it was said that it was for the county judge to decide whether the expense was reasonable. James, L. J., said: "I agree that the general rule is that a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly." Mellish, L. J., after expressing his approval, as a general rule, of the dictum of Alderson, B., in Hamlin *v.* Great Northern Ry. Co.(a) said that "the question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances." He continued: "Now, one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. . . . . I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost, if he had no company to look to,

(a) 1 H. & N. 408.

he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company, but that it is unreasonable to allow a passenger to put the company to an expense to which he would not think of putting himself if he had no company to look to." Where a passenger is put off a train at a wrong station, he may take necessary steps for self-protection; and if he acts reasonably he may recover compensation of the wrong-doer for all evil results, or for any expense to which he is put. If he can procure another conveyance at reasonable expense, he cannot recover for injury caused by a long or difficult journey on foot.[a] If it is night, and there are houses near by which he sees or should see, he cannot recover for injury caused by walking home unless he tried to obtain admission at the houses and was refused.[b] So in Wilcox *v.* Campbell,[c] where the plaintiff, in order to save land from foreclosure, would have had to raise money in excess of the value of the land, and it did not appear that he could have raised it, it was held by the New York Supreme Court that the rule did not apply—although, if he had raised it, he would have been entitled to recover it back; and on appeal the judgment was affirmed.[d] So the owner of a vessel injured by a collision can recover the reasonable expense of repairing her.[e] So a farmer can recover the reasonable expense of trying to save his crops from destruction where they had been injured by defendant's failure to deliver a threshing machine,[f] and the purchaser of a horse with warranty as a

[a] Indianapolis, B. & W. Ry. Co. *v.* Birney, 71 Ill. 391.
[b] Louisville, N. & G. S. R.R. Co. *v.* Fleming, 14 Lea. 128
[c] 35 Hun 254.
[d] S. C. on appeal, 106 N. Y. 325.
[e] Mailler *v.* Express Propeller Line, 61 N. Y. 312.
[f] Smeed *v.* Foord, 1 E. & E. 602.

foal-getter, the reasonable expense of testing him; but not any expenses subsequent to this.([a]) As it is the plaintiff's duty to render the loss as light as possible, and this generally involves expense, it has been held in Maryland that for breach of contract to furnish freight and employment to plaintiff's boat, it was not the duty of the plaintiff to get rid of expense by keeping his boat and horses unemployed and dismissing his hands.([b])

When a tenant makes repairs to avoid the consequences of a breach of a covenant to repair, he can only charge the landlord with a reasonable expense, but he is not compelled to select precisely the same kind of materials, or to be precise to take care that the expense is "not a farthing greater than had before been expended on the same spot." Thus a tenant has been allowed to recover the expense of repainting with zinc paint, which was about fifteen per cent. more expensive than common lead paint—the original style of painting—it appearing that the zinc paint was a more desirable and better material. The whole question is, in fact, one of reasonable expense in view of all the circumstances of the case.([c]) And so a plaintiff can show what he has had to pay for the best substitute he could procure for what the defendant had neglected to furnish.([d]) Where the plaintiff is wrongfully discharged from the defendant's employment, he may recover the expense incurred in obtaining another employment; ([e]) but, as in all cases, the expense

([a]) Newberry *v.* Bennett, 38 Fed. Rep. 308.

([b]) Benson *v.* Atwood, 13 Md. 20; Borden Mining Co. *v.* Barry, 17 Md. 419. But this must not be taken as an invariable rule of law, as circumstances might show that the expense was plainly useless, and in such a case, to incur it would be a wilful act on the part of the plaintiff, and no part of the ordinary conduct of a prudent man.

([c]) Myers *v.* Burns, 35 N.Y. 269 (1866).

([d]) Hinde *v.* Liddell, L. R. 10 Q. B. 265.

([e]) Dickinson *v.* Talmage, 138 Mass. 249.

must be a reasonable one. Thus, where one had wrongfully delayed delivering a conveyance of land on which was a barn, but afterward conveyed the premises, the expense incurred by the plaintiff in preparing to build another barn on his own ground during the period of the defendant's refusal, was held too remote.(a) But when the defendant failed to repair the plaintiff's saw-mill according to contract, the expense of hauling his logs to another mill to be sawed may be recovered.(b) In Green *v.* Mann (c) it is laid down that unless the expense of making repairs is "trifling" the defendant cannot insist that it constitutes the sole measure of damages. But the rule seems to be grounded not on the question whether the expense is trifling, but whether, under all the circumstances of the case, it is such an expense as a prudent man would under the circumstances incur.

§ 219. **Rule does not require impossibilities.**—In an action against a carrier for non-delivery of corn, where the plaintiff claimed to recover for a sub-contract, and defendant urged that the plaintiff might have bought the corn in the market to fill the contract, and that not having done so the measure of damages was merely the market price, the Supreme Court of Illinois said: "However this might be, *if they had not already invested their money in the corn in controversy*, we cannot so hold in the present case. It would be very unreasonable to require one who has bought and paid for an article, to have the money in his pocket with which to buy a second, in case of non-delivery of the first." (d)

(a) Warner *v.* Bacon, 8 Gray 397.

(b) Hinckley *v.* Beckwith, 13 Wis. 31.

(c) 11 Ill. 613 (1850).

(d) Illinois Centr. R.R. Co. *v.* Cobb, 64 Ill. 128 (1872). This would, as stated, seem to make the rule applicable only where no consideration had passed, but the court probably did not mean to go so far. The onus is on

And so in Startup *v.* Cortazzi,(a) Alderson, B., said: "It appears that the price at that time was not the proper criterion for estimating the damages; for as the plaintiffs had already parted with their money they were not then in a situation to purchase other seed."

§ 220. **Statutory damages—Eminent domain.**—The foregoing general rule applies as well where the damages are statutory. So in cases of injuries inflicted through the exercise of the power of eminent domain, it is expected that the owner will use reasonable and proper precautions to prevent or diminish the injury, and expenses incurred in this way are a part of his measure of damages.(b) And where a city is liable for damages through changing the grade of the street, it has been held that the measure is the expense of changing the grade of the house and lot to conform.(c)

Where part of the plaintiff's sea wall was appropriated, but the wall still served its former use, it was held that the measure of damages was what would make the plaintiff whole for the occupation of the wall, and not what the wall cost, for this might be more or less than the

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the defendant to prove that plaintiff might have procured the corn. If the plaintiff had no more money, nor credit, this would be a matter for him to prove in reply, See Middlekauff *v.* Smith, 1 Md. 329, where the Maryland Court of Appeals, speaking of a covenant by landlord to repair, and the rule of avoidable consequences as applicable to the lessee, says: "Many repairs may have been needed which *his peculiar situation or circumstances* would not have permitted him to have made, and thus one of the very purposes he may have had in view in requiring from his landlord a covenant to repair, might have been defeated." There would seem to be no way of escaping the conclusion that in all such cases the party injured may prove his pecuniary incapacity to make expenditures of the magnitude required. And this limitation upon the rule appears to have been applied in Wilcox *v.* Campbell, 35 Hun 234; on app. 106 N. Y. 325.

(a) 2 C. M. & R. 165.

(b) Gregg *v.* The Mayor, 56 Md. 256.

(c) McCarthy *v.* St. Paul, 22 Minn. 527.

actual damages.[a] On the other hand, where the defendant cut through another railroad's embankment, it was held that the measure of damages was the cost of building a bridge and keeping it in repair.[b] So, in estimating damages caused by laying a railroad illegally in a highway without making compensation, it has been held that the measure of damages may be the cost of removing the obstruction and restoring the highway to its former condition.[c] And it has been said that where the damage is to an easement of access, the measure of damages may be the expense of making the access as good as it had been before.[d]

§ 221. **Rule requires only ordinary care.**—As the rule allows only reasonable expenses, so it requires the party injured to use ordinary efforts,[e] neither greater nor less than a prudent man would be likely to use, and consequently where the jury were told that they must find for the plaintiffs unless a *slight expense* and *slight effort* would have prevented the injury, this was held to be error.[f] And, on the other hand, the party injured is not under any obligation to use *more* than ordinary diligence.[g]

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[a] Gear *v.* C. C. & D. R. Co., 39 Ia. 23.

[b] Chicago & A. R.R. Co. *v.* Springfield & N. W. R.R. Co., 67 Ill. 142.

[c] Lawrence R.R. Co. *v.* Mahoning County, 35 Oh. St. 1.

[d] *In re* N. Y., W. S. & B. Ry. Co., 29 Hun 646.

[e] Parker *v.* Meadows, 86 Tenn. 181.

[f] Simpson *v.* Keokuk, 34 Ia. 568; Allender *v.* Chicago, R. I. & P. R.R. Co., 37 Ia. 264 (1873). In Chase *v.* New York Central R.R. Co., 24 Barb. 273, an action brought for damage done to plaintiff's premises by water which got into her cellar, the trial judge charged that she was bound to use "ordinary care and diligence" to prevent the house being injured thereby, and *only ordinary "care and diligence."* The General Term held this erroneous, for reasons which the opinion of Mullett, J., does not make clear. The decision seems to be contrary to the current of authority. So also does the language of the Supreme Court of Illinois (Green *v.* Mann, 11 Ill. 613), to the effect that the rule only requires the performance of "trifling acts."

[g] Louisville, N. A. & C. Ry. Co. *v.* Falvey, 104 Ind. 409, 425 (1885); Leonard *v.* New York, A. & B. E. M. T. Co., 41 N. Y. 544.

The amount of effort must be determined by all the circumstances of the case. In Bradley *v.* Denton (a) it is held to be well settled and founded on the clearest principles of equity that if the freighter fails to furnish return freight, it is the duty of the master to seek for and obtain other freight, if possible. But where, on a contract to furnish several cargoes, after one has been furnished, the shipper notifies the carrier that he will not furnish any more, this is a breach, and the freighter cannot enhance the damages by returning empty, and claiming full freight. His natural course is to seek other employment; whether in the port of destination only, or in other ports as well, must depend on all the circumstances of the case, such as insurance, the weather, or the condition of the vessel.

In case of breach of covenant for quiet enjoyment, where the lessee is prevented from obtaining possession of a store, in which to carry on his business, he will, as a prudent man procure a new store; but he is not bound to remove to a remote part of the city, and thus lose to some extent the good-will of his business, which had been carried on in the vicinity of the premises leased; nor would he be required to take another store not reasonably well adapted to his business.(b)

In an action against a railroad for failure to erect cattle-guards, in compliance with statute, it appeared that injury to the crops might have been prevented by keeping a constant watch day and night for four or five months, at a cost of two or three dollars a day for a man alone; but it was held that to require this would be to call for unreasonable efforts and great expense.(c)

(a) 3 Wis. 557.

(b) Poposkey *v.* Munkwitz, 68 Wis. 322.

(c) Smith *v.* Chicago, C. & D. R.R. Co., 38 Ia. 518 (1874).

§ 222. **Other limits of the rule.**—We have seen that the plaintiff is always limited in his recovery by the boundary of ordinary care and of reasonable expense. So there are many other limitations, which are really involved in the rule itself, but the statement of which conduces to a clearer apprehension of the reason upon which it is founded. Thus it has been decided that it does not relate to the performance of the primary obligations of the contract, and the party whose duty it is to perform, cannot, while the contract is in force, be heard to say that the plaintiff might have performed for him.[a] And so the mere fact that the plaintiff might by some acts of his have avoided the consequences, will not prevent the plaintiff's recovery. There must be a want of ordinary diligence. Thus in Clark *v.* Miller,[b] an action for failure on the part of a town supervisor to present to supervisors of a county a reassessment of damages in the plaintiff's favor, the plaintiff was allowed to recover the amount of the reassessment, and he was not limited in his recovery of interest to the period when he might have had his claim presented to another board of supervisors (perhaps because what the result would have been was not certain). And in an action against a register of deeds for a false return in omitting a mortgage, it was held that plaintiff was not bound to tell the defendant of the mortgage when he heard of it, so that the defendant could buy it up before foreclosure, the court saying: "It is undoubtedly true that the plaintiff was under obligation to make reasonable exertions to prevent the increase of damages likely to fall upon himself, and thus incidentally to protect the defendant; but it was not his duty to go one

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[a] Louisville, N. A. & C. Ry. Co. *v.* Sumner, 106 Ind. 55; Same *v.* Moore, Ib. 600.

[b] 54 N. Y. 528.

step further," or "to do an act which will not affect his own damages, though it would be of service to the wrong-doer." [a] Some of the more usual limitations will now be considered.

§ 223. **Plaintiff's knowledge—Notice.**—Notwithstanding that a wrong has been committed, the plaintiff may be in ignorance of the fact, and so long as he remains in ignorance, the duty to avoid the consequences cannot arise. Thus in Loker *v.* Damon [b] the learned Chief-Justice Shaw said: "Suppose a man should enter his neighbor's field unlawfully, and leave the gate open, if, *before the owner knows it*, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully and obstinately or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly." And so in case of a sale, if the vendor has *reason to suppose* that the article does not correspond with a warranty or description, he cannot be permitted to shut his eyes to the probable consequences, and then hold the defendant for them.[c]

In most cases, there is probably little doubt as to what is the most proper course for the plaintiff to pursue; but this does not always happen. Thus in a recent case in Texas, where the plaintiff sued to recover for personal injuries, it appeared that the injuries had been aggravated by his own conduct in neglecting to refrain from all exertion while under treatment. But it not appearing clearly that he knew of the importance of this, or that he had been seriously advised as to the proper course to pursue, it was held that he was not precluded from recovering for the entire loss.[d]

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[a] Van Schaick *v.* Sigel, 9 Daly 383. [b] 17 Pick. 284.
[c] Bagley *v.* Cleveland Rolling Mill Co., 22 Blatchf. 342.
[d] Gulf Col. & S. F. Ry. Co. *v.* McMannewitz, 70 Tex. 73 (1888).

In Sherman *v.* Fall River Iron Works Co.,[a] where a lessee, a livery-stable keeper, had a right of action against defendant for an escape of gas through the ground and into a well used by him for his livery-stable, it was held that he might recover for expenses incurred in reasonable and proper attempts to exclude the gas, but not for injury caused by allowing his horses to drink the water after he knew that it was corrupted. Hoar, J., said: "He can recover only for the natural and direct consequences of the wrongful act of the defendants, and not for consequential damages which might have been avoided by ordinary care on his own part." And so where cotton stored with defendants as warehousemen, was thrown into the street by military authority, it was held that the owner, if *he was chargeable with knowledge of the facts*, should have taken reasonable steps to protect his property.[b]

§ 224. **Plaintiff need not anticipate wrong.**—The duty to prevent damages, or to lessen the loss which will ultimately fall on plaintiff, cannot possibly arise until a wrong or breach of contract has actually been committed. And so, in proceedings under the eminent domain statute, it has been held that before the *taking*, the landowner is under no duty to avoid improving his property merely because he has notice of proceedings to condemn. Such proceedings may be abandoned, and until they are consummated his position is that of any owner.[c] On the same principle, where a cargo of fruit was injured through a fumigation wrongfully made by a member of a

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[a] 2 All. 524.

[b] Smith *v.* Frost, 51 Ga. 336 (1874).

[c] Driver *v.* Western Union R. R. Co., 32 Wis. 569. The court in this case say: "There is no ground for saying that the plaintiff proceeded in bad faith, and made an expensive improvement merely for the purpose of enhancing the damages." But if the plaintiff was in the enjoyment of his full legal rights, on what principle could his motive be inquired into in any case?

Board of Health, and it appeared that plaintiff might have unloaded, and was advised so to do, and might thus have avoided loss, the defendant was, after full consideration, held responsible by the Supreme Court of Louisiana, on the ground that a threat of the commission of a trespass does not raise a duty in the person threatened to take any steps to avoid the consequences of such a wrong.(a) And in an action to recover damages for injury to plaintiff's hay through the building of a dam, where the jury found that by the expenditure of $60 above what was usual and necessary before the dam was erected, the hay might have been secured, it was held that the plaintiff's damages were not to be reduced on this account, as it did not appear that he had any good reason to anticipate the injury. It would seem as if this decision might be rested explicitly on the principle that it is never the duty of the plaintiff to attempt to reduce the loss which may flow from anticipated wrong.(b) And so a plaintiff need not exercise any care of logs to prevent their being lost by the defendant's wrong in putting a boom across a stream, unless he had notice that they were in danger; and it seems that he need do nothing, even when he heard of the defendant's intention of swinging the boom, the court saying, that it is enough if he exercises ordinary care for the preservation of the logs after he knows that the wrong is done.(c)

Again, where a passenger on a railroad train has paid his fare, and for no fault of his own is obliged to leave the train or pay more, it is not his duty to pay the additional fare, merely to protect the company against the

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(a) Beers *v.* Board of Health, 35 La. Ann. 1132 (1883).

(b) Reynolds *v.* Chandler R. Co., 43 Me. 513 (1857).

(c) Plummer *v.* Pen. Lumber Assoc., 67 Me. 363 (1877).

consequences of their own wrong. This is not the meaning of the rule.(a)

§ 225. **Plaintiff cannot be called on to commit a wrong.**—This rule never can be pushed to the extent of requiring the plaintiff to commit a wrong himself; *e. g.*, where the cause of original wrong is on land of defendant, plaintiff cannot be under any obligation to trespass on that land to reduce it.(b) So in an action for overflowing mining claims, although by pulling off a board from the flume, the plaintiff might have stopped the damage, he was not held to be bound to reduce the loss in this way, because in order to accomplish it, he would have been obliged to commit a trespass.(c) And so, probably for the same reason, in an action against a city for injuries caused to abuttors by accumulations of water, in consequence of the construction of gutters and drains, the court, in laying down the usual rule, was careful to qualify it by adding: "We do not intimate that it would have been the duty of plaintiff to interfere with the streets or gutters, so as to change the construction of them."(d) And so, generally, the plaintiff is not required to take any measures to reduce the damages which are not within his legal rights;(e) *e. g.*, he could not be called upon to violate a contract with a third party.(f)

§ 226. **Defendant prevents plaintiff from preventing consequences.**—But the plaintiff may himself be prevented by the defendant from preventing avoidable consequences. It may happen that when there is a breach of contract by defendant, as in the case of an obligation to keep leased premises in repair, the plaintiff is himself prevented from

(a) Yorton *v.* Mil. L. S. & W. Ry. Co., 62 Wis. 367.
(b) Chicago, R. I. & P. R.R. Co. *v.* Carey. 90 Ill. 514.
(c) Wolf *v.* St. Louis Independent Water Co., 15 Cal. 319.
(d) Simpson *v.* Keokuk, 34 Ia. 568.
(e) Kankakee & S. R.R. Co. *v.* Horan, 23 Ill. App. 259.
(f) Earl, Ch. J., in Leonard *v.* New York, etc., Tel. Co., 41 N. Y. 544, 566.

taking the necessary steps to render the damage as light as possible by the dilatory action of the defendant; *e. g.*, where the defendants, after notice to repair, promise from time to time, but fail to do so. In such a case, where through such a prolongation of the period of loss, it finally extended the cost of the repairs, it was held in Vermont that the loss was caused by and should fall on the defendants.(a)

And so in another case in the same State. The complainants had purchased of defendants, in 1868, a patent stone channelling machine for $6,000, the defendants agreeing to indemnify them against the consequences of infringement. In 1870 complainants were enjoined for infringement of another patent, and set the machine aside. They might then have bought an equally valuable machine at the same price, but did not do so, as defendants from time to time promised to furnish another. They therefore hired their channelling done at regular prices, and at an expense, down to the spring of 1872, of $1,749.80 more than the work done by their own machine would have cost them. By this time it became understood that defendants would not furnish another machine, but the complainants went on hiring the work done as before, until the increased cost amounted to $9,243.45, for which sum they brought suit. It was held, however, that the complainants should have purchased another machine, as soon as they knew that the defendants would not furnish one, and that their increase of damages was: 1st, the actual cost of the work, $1,749.80, with interest from May 1st, 1872, also the cost of another machine ($6,000), with interest from the same date; subject to the right of the defendants to take back the old machine or apply its value in reduction of damages.(b)

(a) Keyes *v.* Western Vt. Slate Co., 34 Vt. 81.

(b) Eureka Marble Co. *v.* Windsor Mfg Co., 51 Vt. 170 (1878).

The same view has been taken by the Supreme Court of Massachusetts in an action for breach of agreement, in making a sale of a house, to assign the policy of insurance.(a) Defendant, though often requested, did not assign, but continued to promise, and it was held that plaintiff was not entitled to recover the value of the building in its destruction by fire, although the policy had become void by the failure to assign, and the insurance was thus lost, and could recover only the cost of insurance for the unexpired term of policy, the reason being that after the defendant's default had become evident, she should have insured herself.

§ 227. **Burden of proof.**—It has been repeatedly held that the burden of proof is always on the defendant to prove that the plaintiff might have reduced damages.(b) So a vendee cannot in an action for vendor's failure to deliver logs, recover damages because his mill remained idle, if he could have bought other logs, but the burden of proving that he could is, it seems, on the vendor.(c) "But first of all the defence set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should, therefore, prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrong-doer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the onus must in all such cases be upon the defendant."(d) "*Prima facie*, the plaintiff is damaged to the

(a) Dodd *v.* Jones, 137 Mass. 322.

(b) Hamilton *v.* McPherson, 28 N. Y. 72.

(c) Hopkins *v.* Sanford, 41 Mich. 243.

(d) Costigan *v.* Mohawk & H. R.R. Co., 2 Den. 609 (1846); *acc.* Roper *v.* Johnson, L. R. 8 C. P. 167; Murrell *v.* Whiting, 32 Ala. 54; Dunn *v.* Johnson, 33 Ind. 54; Hamilton *v.* McPherson, 28 N. Y. 72; Leonard *v.* New

extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or at least that such employment might have been found."[a]

§ 228. **Court and jury.**—Whether the party injured has used ordinary care to make the consequences of the injury as light as possible, is usually a question of fact, depending upon all the circumstances of the case. Thus in the common case of injury to the person, the plaintiff is required to show that he employed a competent physician, but if the physician makes mistakes in his treatment, this is not the fault of the plaintiff.[b] The question whether moderate expense and ordinary effort would have prevented the damages, is for the jury.[c]

In Parker *v.* Meadows[d] it was held that the court was to determine in each case what was a reasonable expenditure, regard being had to all the circumstances[e] But whether the plaintiff should have reduced damages, is substantially the same as the question whether he has been negligent; and this is usually for the jury under proper instructions.[f]

York A. & B. E. M. T. Co., 41 N. Y. 544; Greene *v.* Waggoner, 2 Hilt. (N. Y.) 297 (1859); King *v.* Steiren, 44 Pa. 99.

[a] Howard *v.* Daly, 61 N. Y. 362, 371. When an employee obtains other employment the presumption is said to be that he gets the best wages he can. Hunt *v.* Crane, 33 Miss. 669.

[b] Collins *v.* Council Bluffs, 32 Ia. 324; Rice *v.* Des Moines, 40 Ia. 638; Page *v.* Bucksport, 64 Me. 51; Eastman *v.* Sanborn, 3 Allen 594; Stover *v.* Bluehill, 51 Mo. 439; Tuttle *v.* Farmington, 58 N. H. 13; Lyons *v.* Erie Ry. Co., 57 N. Y. 489; Loeser *v.* Humphrey, 41 Ohio St. 378; Bardwell *v.* Jamaica, 15 Vt. 438.

[c] Little *v.* McGuire, 38 Ia. 560; Smith *v.* Chicago C. & D. R.R. Co., 38 Ia. 518; Leonard *v.* New York, etc. Tel. Co., 41 N. Y. 544.

[d] 86 Tenn. 181.

[e] Citing Hester *v.* Knox, 63 N. Y. 561; Martin *v.* Hill, 42 Ala. 275; Hinckley *v.* Beckwith, 13 Wis. 31.

[f] Bevier *v.* Delaware & H. C. Co., 13 Hun 254 (1878).

CHAPTER VII.

EXPENSES OF LITIGATION.

§ 229. Expense of carrying on a suit not compensated.
230. Reason of the rule.
231. Civil and old common law.
232. Rule in actions of contract.
233. General rule in actions of tort.
234. In cases of aggravation—Exemplary damages.
235. Patent and admiralty cases.
236. Expenses of a prior litigation.
§ 237. Expense of dissolving injunction or discharging attachment.
238. Covenants and contracts of warranty or indemnity.
239. Expenses must be reasonable.
240. Plaintiff subjected to suit through defendant's breach of contract.
241. Plaintiff subjected to suit through defendant's tort.

§ 229. Expense of carrying on a suit not compensated.—We have seen that in order to recover complete compensation, the plaintiff should, in case he is successful, be allowed the expenses of litigation. Nevertheless, the general rule is, that counsel fees are not recoverable as damages. The law awards to the successful party his taxable costs, but the fees which he pays to counsel are not taken into consideration.[a] "In general the law considers the taxed costs as the only damage which a party sustains by the defence of a suit against him, and these he recovers by the judgment in his favor."[b]

[a] Oelrichs *v.* Spain, 15 Wall. 211; Henry *v.* Davis, 123 Mass. 345; Warren *v.* Cole, 15 Mich. 265; Haverstick *v.* Erie Gas Co., 29 Pa. 254. Nor can he recover for his expense and time in attending court. Jacobson *v.* Poindexter, 42 Ark. 97.

[b] Young *v.* Courtney, 13 La. Ann. 193. This rule applies also in the analogous case of witness fees. Thus where a physician's charge for attending the plaintiff included compensation for the expense of attending as a witness, that part of the charge which covered this expense was not allowed. Gulf, C. & S. F. Ry. Co. *v.* Campbell, 76 Tex. 174.

So in an action of asumpsit,[1] the Supreme Court of Massachusetts said, that "the expenditure for counsel fees is an item ordinarily to be borne by the suitor, except so far as it may be remunerated by the taxable costs for the travel and attendance of the party, and the allowance of an attorney's fee." "In actions of debt, covenant, and assumpsit, the plaintiff can recover but legal costs as compensation for his expenditure in the suit, and as punishment to the defendant for his unjust detention of the debt."[2]

And so far is the principle carried in Massachusetts, that a trustee (or garnishee), in whose hands the funds of the debtor are found, can retain nothing to meet the expenses of litigation.[3]

This rule of the common law is in some jurisdictions changed by statute. Thus in Georgia (a) counsel fees are included in the damages where the defendant acted in bad faith, or was stubbornly litigious, whether the action is contract or tort.

§ 230. Reason of the rule.—It has been intimated (b) that the reason of this rule disallowing counsel fees is that they are a remote loss. But this would be very difficult to maintain. The expenses of a litigation to obtain compensation would seem to be, though not a direct, certainly a natural and proximate consequence of the injury, and hence to belong to that class of consequential losses which can be recovered. The true foundation of the rule we take to be that the common law has arbitrarily fixed taxable costs as the limit of remuneration for expenses of litigation. That counsel fees are not

[1] Guild *v.* Guild, 2 Met. 229.
[2] Stimpson *v.* Railroads, 1 Wall, jr., 164, 169, per Grier, J.
[3] Adams *v.* Cordis, 8 Pick. 260.

(a) Code of 1882, § 2942.
(b) Pacific Ins. Co. *v.* Conard, 1 Bald. 138.

See case of term "Direct" in ante § 201.

regarded as in themselves a remote loss, is shown in that class of cases where the expenses of a former suit are recovered.

§ 231. **Civil and old common law.**—*We have already had occasion to notice that legal relief is at best but partial. § 38
Under the Roman law the successful party was not restricted to a suit for malicious prosecution, and the party justly chargeable with making a totally ungrounded claim or defence, was punished with a pecuniary mulct. And this, at one time, seems to have been adopted into the jurisprudence of modern Europe. Francis the First, by his ordinance of 1539, Art. 88, authorized the judge to inflict damages proportioned to the "temerity" of the losing party.[1] And so, too, in England, originally it seems that the plaintiff, in all cases of unsuccessful litigation, might be amerced *pro falso clamore*, and the amerciament [*a merci*, Fr.] was affeered [*affier*, Fr.], or assessed, by the court or its officers.

§ 232. **Rule in actions of contract.**—This power, however, no longer exists, and in cases of contract no redress is given beyond the taxable costs. Even in cases the most frivolous and vexatious, in no case is any independent redress given, *i. e.*, by a recriminatory action, unless the first suit or proceeding be malicious. This principle is rigorously applied to counsel fees in all cases of contract, and, without discrimination, to both parties to the litigation.** So in an action on an attachment or injunction bond, the expenses of prosecuting the suit on the bond cannot be recovered.(a)

We are now speaking of counsel fees in the principal

[1] Merlin; Repertoire, in voc. Dommages-Intêrêts.

(a) Goodbar *v.* Lindsley, 51 Ark. 380; Vorse *v.* Phillips, 37 Ia. 428; Offutt *v.* Edwards, 9 Rob. (La.) 90.

suit, for, as we shall presently see, counsel fees in former suits are sometimes allowed.

§ 233. **General rule in actions of tort.**—In cases of tort there has been some tendency on the part of the courts to allow the plaintiff his counsel fees. Thus, in an action on the case for flowing back the water of a river in Maine, on the plaintiff's lands, although no malice was proved, Judge Story told the jury, that for the purpose of giving a full indemnity, they might take into consideration such expenses of fees to counsel, and such other necessary expenses as they might think were properly and fairly incurred; and on a motion made for a new trial, on the ground that the damages were excessive, the court refused to interfere.[1]

Such seems to be the rule still in Connecticut and Ohio,(a) but it is firmly established elsewhere that counsel fees cannot be included in compensatory damages,(b) even though the suit was brought merely to vex the prevailing party.(c)

In Massachusetts, the Supreme Court refused to allow counsel fees in an action on the case for setting a fire on the defendant's own land, whereby the plaintiff's wood was consumed, holding that it was immaterial with reference to the damages, whether the accident resulted from *gross negligence*, or merely the want of *ordinary care*.[2] "It is now well settled," said the court, "that

[1] Whipple *v.* Cumberland M. Co., 2 Story, 661.

[2] Barnard *v.* Poor, 21 Pick. 378.

(a) Platt *v.* Brown, 30 Conn. 336; Welch *v.* Durand, 36 Conn. 182; Finney *v.* Smith, 31 Oh. St. 529. To the same effect are Armstrong *v.* Pierson, 8 Ia. 29; Rose *v.* Belyea, 1 Han. 109.

(b) Flanders *v.* Tweed, 15 Wall. 450; Winstead *v.* Hulme, 32 Kas. 568; Kelly *v.* Rogers, 21 Minn. 146; Winkler *v.* Roeder, 23 Neb. 706; Atkins *v.* Gladwish, 25 Neb. 390; Hicks *v.* Foster, 13 Barb. 663; Welch *v.* Northeastern R.R. Co., 12 Rich. 290; Landa *v.* Obert, 45 Tex. 539.

(c) Salado College *v.* Davis, 47 Tex. 131.

even in an action of trespass or other action sounding in damages, the counsel fees and other expenses of prosecuting the suit, not included in the taxed costs, cannot be taken into consideration in assessing damages." And the Supreme Court of New York have laid down the same rule in an action on the case for negligence, against a railroad, for injuries to the person, which we have already noticed.[1]

In an action of trespass against the marshal of the United States, for making an illegal levy on certain teas, no circumstances of aggravation being shown, Mr. Justice Baldwin held that the jury could not allow the plaintiff his counsel fees by way of damages. He said:

"It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements in recovering this property; but the hardship is equally great in a suit for money lent, or to recover possession of land; they are deemed in law losses without injury, for which no legal remedy is afforded. I am, therefore, of opinion that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements, they being consequent losses only, and not the actual or direct injury to their property which they have sustained by its seizure and detention, for which alone they are entitled to recover damages in this case, it not being attended with any circumstances of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses."[2]

In Oelrichs *v.* Spain (a) Swayne, J., said: "In actions of trespass, where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is

[1] Lincoln *v.* Saratoga & S. R.R. Co. 23 Wend. 425.

[2] Pacific Ins. Co. *v.* Conard, 1 Bald. 138, 146.

(a) 15 Wall. 211, 230.

no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated."

Counsel fees cannot be recovered in actions of replevin.(a)

§ 234. In cases of aggravation—Exemplary damages.— In some States it is held that facts which justify the infliction of exemplary damages will also justify the jury in adding the amount of the counsel fees to the verdict, not as part of the exemplary damages, but as compensatory damages.

In an action on the case brought in Connecticut, after stating the rule allowing vindictive or exemplary damages, the court proceeded to use this language:

"The argument in opposition to the doctrine of the charge is substantially founded upon the assumed principle, that the defendant cannot be subjected to a greater sum in damages than the plaintiff has actually sustained. But every case in which the recovery of vindictive damages has been justified, stands opposed to this argument. And we cannot comprehend the force of the reasoning which will admit the right of a plaintiff to recover as vindictive damages, beyond the amount of injury confessedly incurred, and in case of an act and injury equally wanton and wilfully committed or permitted, will deny to him a right to recover an actual indemnity for the expense to which the defendant's misconduct has subjected him. In the cases to which we have been referred in other States, as deciding a different principle, the courts seem to have assumed that the taxable costs of the plaintiff are his only legitimate compensation for the expense incurred. If taxable costs are presumed to be equivalent to actual necessary charges as a matter of law, every client knows as a matter of fact they are not. And legal fictions should never be permitted to work injustice."[1]

In Bennett *v.* Gibbons (b) Loomis, J., said: "It is not

[1] Linsley *v.* Bushnell, 15 Conn. 225.

(a) Cowden *v.* Lockridge, 60 Miss. 385; Taylor *v.* Morton, 61 Miss. 24; Davis *v.* Cushing, 5 All. (N. B.) 383.

(b) 55 Conn. 450, 452.

usual to introduce evidence to show specifically the amount of such expenses, yet, inasmuch as it is a legitimate element of damage, we do not see why relevant evidence is not as proper as in relation to any other item of damage, it being understood of course that it is discretionary with the jury to include this or not; but it seems to us that it cannot be erroneous to furnish the jury with some sure basis for such an addition, instead of leaving the whole matter to guesswork." And it is well settled in Connecticut that in such actions counsel fees may be allowed.([a])

In a still stronger case in Connecticut, in an action of assault and battery, where, in consequence of the death of a juror, a second trial became necessary, it was held that the jury, in estimating the damages, might take into consideration the expenses of the first trial.[1] The same rule seems to prevail in Ohio.([b]) The Supreme Court of that State use the following language: "The authorities are not uniform; but the better opinion now seems to be that in actions *ex contractu* and in cases nominally in tort, but where no wrong in the moral sense of the term is complained of, the fees of counsel ought not to be included; but in cases where the act complained of is tainted by fraud, or involves an ingredient of malice or insult, the jury which has power to punish has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of dam-

[1] Noyes *v.* Ward, 19 Conn. 250.

([a]) *Acc.* Huntley v. Bacon, 15 Conn. 267; Ives *v.* Carter, 24 Conn. 392; Beecher *v.* Derby Bridge Co., 24 Conn. 491; St. Peter's Church *v.* Beach, 26 Conn. 355; Dibble *v.* Morris, 26 Conn. 416; Platt *v.* Brown, 30 Conn. 336; Welch *v.* Durand, 36 Conn. 182; Dalton *v.* Beers, 38 Conn. 529; Mason *v.* Hawes, 52 Conn. 12; Wynne *v.* Parsons, 57 Conn. 73.

([b]) Finney *v.* Smith, 31 Oh. St. 529; Stevenson *v.* Morris, 37 Oh. St. 10; Peckham Iron Co. *v.* Harper, 41 Oh. St. 100.

ages." (a) And in Nevada, where a libel had been published, and a libel suit was necessary to vindicate the plaintiff's character, it was held that the plaintiff might recover the expense of litigation.(b)

This doctrine does not prevail generally, but in many States it has been held that the jury in assessing exemplary damages have a right to know and consider the expense of litigation.(c) Thus in Alabama, in an action for malicious prosecution, the Supreme Court has said, while recognizing the conflict of authority, "We can readily perceive the justice and good sense of the rule which requires a party who wantonly and maliciously abuses the process of the court, or sues out an attachment for the purpose of worrying and harassing the defendant, without probable cause, to make good his losses, and to furnish complete reparation and indemnity for the injury his malice has occasioned"; and the defendant's counsel fees for defending the original suit were allowed to be "proven and taken into consideration by the jury." [1]

But it is difficult to see why such expenses should be allowed under the head of exemplary damages. The plaintiff's counsel fees are an expense incurred by him, and their reimbursement to him brings the measure of damages back toward the standard of compensation. It

[1] Marshall *v.* Betner, 17 Ala. 832.

(a) Roberts *v.* Mason, 10 Oh. St. 277.

(b) Thompson *v.* Powning, 15 Nev. 195.

(c) Patton *v.* Garrett, 37 Ark. 605 (*semble*); Titus *v.* Corkins, 21 Kas. 722; Winstead *v.* Hulme, 32 Kas. 568; Eatman *v.* New Orleans P. Ry. Co., 35 La. Ann. 1018; New Orleans, J. & G. N. R.R. Co. *v.* Allbritton, 38 Miss. 242; Cowden *v.* Lockridge, 60 Miss. 385; Taylor *v.* Morton, 61 Miss. 24; Landa *v.* Obert, 45 Tex. 539, and by the codes of California and Georgia; Beckman *v.* Skaggs, 61 Cal. 362; Savannah *v.* Waldner, 49 Ga. 316; Guernsey *v.* Shellman, 9 Ga. 797; Mosely *v.* Sanders, 76 Ga. 293.

is an item of compensation, indeed, not usually allowed; but, nevertheless, it is really compensation. There is nothing especially punitory as regards the defendant in the fact that the sum in which he is mulcted happens, in whole or in part, to represent the counsel fees paid or incurred by his injured adversary. His payment to the plaintiff of a considerable sum is equally a punishment, whether the plaintiff have paid a like or less sum as counsel fees or not. Indeed, when the jury are permitted to break beyond the bounds which the law, having compensation only in view, prescribes, it will be found, on analysis, we think, that every attempt to introduce other standards for their guidance will be futile. And accordingly by the better opinion, no inquiry into counsel fees should be allowed, even in those actions of tort in which the jury may give exemplary damages.(a) Swayne, J., in Oelrichs *v.* Spain, *supra*, in reference to counsel fees in such cases, cites with approval the remarks of the court in Day *v.* Woodworth:(b) "The punishment of the defendant's delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages assessed by way of example may thus indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment, or a necessary element in its infliction." To the same effect see Fairbanks *v.* Witter,(c) where the court said that counsel fees could no more be allowed in actions where

(a) Howell *v.* Scoggins, 48 Cal. 355; Falk *v.* Waterman, 49 Cal. 224; Kelly *v.* Rogers, 21 Minn. 146; Halstead *v.* Nelson, 24 Hun 395; Welch *v.* Southeastern R.R. Co., 12 Rich. 290; Hoadley *v.* Watson, 45 Vt. 289; Earl *v.* Tupper, 45 Vt. 275.

(b) 13 How. 363, 371

(c) 18 Wis. 287, 290.

punitory damages can be given than in others, and that if they could be assessed by the jury, it must be on the principle "that they are conequential damages, and relate to the amount of compensation, rather than refer to damages which may be inflicted by way of penalty or punishment for aggravated misconduct." So in an action of assault and battery, it has been held that, although that was a case in which exemplary damages were allowable, a jury could not take into consideration counsel fees and expenses, for the legislature has fixed the taxable costs as full indemnity. And in New York it has been held error for the judge, in an action of slander, to charge the jury that, in awarding the damages, they might take into consideration the expenses to which the plaintiff had been put, by being compelled to come into court to vindicate her character.(a)

§ 235. **Patent and admiralty cases.**—In an early case[1] in the Supreme Court of the United States, of a libel filed by the Spanish consul, for restitution of a Spanish vessel captured by a French vessel, it appeared that a charge of sixteen hundred dollars for counsel fees in the courts below had been admitted; and the court said: "We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it." The authority of this case was for a time shaken by later decisions;(b) but in the case of The Margaret *v.* The Connestoga,(c) Grier, J., while apparently admitting the discretionary power of the Admiralty Court to allow counsel fees, expressed his strong repugnance to

[1] Arcambel *v.* Wiseman, 3 Dall. 306.

(a) Hicks *v.* Foster, 13 Barb. 663.

(b) The Apollon, 9 Wheat. 362; Canter *v.* American & O. I. Co., 3 Pet. 307.

(c) 2 Wall. jr. 116.

its exercise, saying that the principle seemed to belong rather to the Hall of the Cadi than the judgment-seat of the court; and counsel fees are no longer allowed in Admiralty.(a) The history of counsel fees in patent suits has been similar. It was a favorite doctrine of Mr. Justice Story that counsel fees should be allowed in patent suits; (b) though at first, he denied recovery (c) on the authority of Arcambel *v.* Wiseman.

But it was now well established that counsel fees cannot be recovered as "actual damages" in patent suits.(d)

§ 236. **Expenses of a prior litigation.**—Where the plaintiff has defended an action for the benefit or on account of the wrongful act of the defendant, two questions arise: first, whether the costs of defending the first action are recoverable; secondly, whether, if recoverable, counsel fees can be included. Some decisions seem to be to the effect that counsel fees are never recoverable. They are apparently founded on a fiction of law, that the costs are a full indemnity for all expenses incurred in the defense of a suit.(e) But it is very doubtful whether that ever applies except as between the parties to the suit, for the reason seems to be, that it is a fixed sum awarded by law to be paid by the prevailing to the losing party. Where a plaintiff has become involved in another suit by the defendant's acts, he should recover the amount of the reasonable expenses in which he has become involved,

(a) The Baltimore, 8 Wall. 377; Swayne, J., in Oelrichs *v.* Spain, 15 Wall. 230.

(b) Boston M. Co. *v.* Fiske, 2 Mason 119; Pierson *v.* Eagle Screw Co., 3 Story, 402; and so, too, held by Judge Woodbury, in the same circuit, Allen *v.* Blunt, 2 Woodb. & M. 121.

(c) Whittemore *v.* Cutter, 1 Gall. 429.

(d) Blanchard's G. T. F. *v.* Warner, 1 Blatchf. 258; Stimpson *v.* The Railroads, 1 Wall. jr. 164.

(e) Leffingwell *v.* Elliott, 10 Pick. 204; Reggio *v.* Braggiotti, 7 Cush. 166.

* When a mortgagee is in possession, he may recover for expenses in protecting property. Annotated Code Md § 1086 n 1. 10 N E R 409; 12 N E R 200

and there seems to be no reason for the existence of the fiction in such a case. A distinction has sometimes been made to the effect that if the plaintiff is successful in the prior litigation, he cannot recover counsel fees, for he has been fully indemnified by receiving the taxed costs, though the rule is otherwise if he is not successful.

Where the prior litigation was unnecessary, the plaintiff can recover neither the costs nor the counsel fees.[a] So an indorser cannot recover against the maker the costs of the action against him, for he should have paid the note. Very frequently the plaintiff is allowed to recover costs and not counsel fees, where a defense of the prior suit was not proper, for it may have been necessary for him to allow judgment to be entered.

Where, however, the prior litigation is a natural consequence of the wrong, and is necessary to determine the amount of damages, or the plaintiff has reasonable grounds to suppose that it is for the interest of the defendant that he should contest the claim, and he does so for the defendant's benefit, the costs and counsel fees are, by the better opinion, recoverable.[b] In New York the "expenses" are recoverable if the litigation is necessary in order to determine the amount of damages.[c] In Hughes *v.* Graeme,[d] an action for the defendant's misrepresentation of his authority as agent, Blackburn, J., stated one of the grounds on which such expenses are recoverable, as follows: "That if a person takes a particular course, reasonably, naturally, and *bona fide*, resulting from the assertion of the authority, then the results of that course would be a reasonable and natural consequence of the

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[a] Lunt *v.* Wrenn, 113 Ill. 168.
[b] Baxendale *v.* London C. & D. Ry. Co., L. R. 10 Ex. 35.
[c] Dubois *v.* Hermance, 56 N. Y. 673.
[d] 33 L. J. Q. B. 335.

warranty, and the costs of it would be part of the reasonable and natural damages."

There has been some question whether counsel fees can be recovered if they have not been actually paid. The better opinion is that liability to pay them is enough.[a] The fee must have been a reasonable one; and the reasonableness is a question for the jury.[b] Notice of the prior litigation should have been given to the defendant, and if it was given the burden of proving the litigation unreasonable is thrown on the defendant; [c] but it would seem not to be necessary to prove such notice in order to maintain the action.

§ 237. Expense of dissolving injunction or discharging attachment.—On a bond given to indemnify the ~~plaintiff~~ defendant for any expense caused by the wrongfulness of judicial proceedings (such as an injunction or attachment bond), the counsel fees expended in obtaining a dissolution of the injunction, or discharge of the attachment, are recoverable if they can be separated from those which would have been incurred in any event in the defense of the action.[d] In some States the counsel fees incurred

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[a] Garrett *v.* Logan, 19 Ala. 344; Miller *v.* Garrett, 35 Ala. 96; Wittich *v.* O'Neal, 22 Fla. 592; Lytton *v.* Baird, 95 Ind. 349; McRae *v.* Brown, 12 La. Ann. 181; Noble *v.* Arnold, 23 Oh. St. 264; Bonesteel *v.* Bonesteel, 30 Wis. 511. But see *contra:* Willson *v.* McEvoy, 25 Cal. 169; Prader *v.* Grimm, 28 Cal. 11. An allegation of payment is, of course, not sustained by proof of a debt having been incurred. Pritchet *v.* Boevey, 1 C. & M. 775; Jones *v.* Lewis, 9 Dowl. P. C. 143; Ward *v.* Haws, 5 Minn. 440.

[b] Spring *v.* Olney, 78 Ill. 101; Tyler *v.* Safford, 31 Kas. 608.

[c] Ryerson *v.* Chapman, 66 Me. 557.

[d] Holmes *v.* Weaver, 52 Ala. 516; Bolling *v.* Tate, 65 Ala. 417; Graves *v.* Moore, 58 Cal. 435; Wittich *v.* O'Neal, 22 Fla. 592; Cummings *v.* Burleson, 78 Ill. 281; Morris *v.* Price, 2 Blackf. 457; Raupman *v.* Evansville, 44 Ind. 392; Swan *v.* Timmons, 81 Ind. 243; Sanford *v.* Willets, 29 Kas. 647; Tyler *v.* Safford, 31 Kas. 608; Trapnall *v.* McAfee, 3 Met. (Ky.) 34; Littlejohn *v.* Wilcox, 2 La. Ann. 620; White *v.* Givens, 29 La. Ann. 571; Adam

in the reference to ascertain the damages suffered by the injunction are also allowed.(a) But no recovery can be had for the general expense of litigating the principal suit,(b) even though the attachment for which the bond was given alone gave the court jurisdiction, and it was found to be wrongful.(c)

Thus in an action on an injunction bond, the plaintiff has been allowed to recover counsel fees in obtaining a dissolution of the injunction, the court, however, saying it would be otherwise if the counsel fees were paid in defending the action, and the dissolution of the injunction was only incidental to a successful defense.(d) So, on such a bond, counsel fees were not allowed, it appearing that the services had been rendered in defending the action, and not merely in obtaining a dissolution of the injunction, although that was the result of the decree.(e) It has been held, where the action and injunction or at-

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v. Gomila, 37 La. Ann. 479; Aiken *v.* Leathers, 40 La. Ann. 23; Swift *v.* Plessner, 39 Mich. 178; Miles *v.* Edwards, 6 Mont. 180; Raymond *v.* Green, 12 Neb. 215; Brown *v.* Jones, 5 Nev. 374; Corcoran *v.* Judson, 24 N. Y. 106; Andrews *v.* Glenville Woolen Co., 50 N. Y. 282; Rose *v.* Post, 56 N. Y. 603; Lyon *v.* Hersey, 32 Hun 253; Crounse *v.* Syracuse, C. & N. Y. R.R. Co., 32 Hun 497; Alexander *v.* Jacoby, 23 Oh. St. 358; Lillie *v.* Lillie, 55 Vt. 470. But *contra*, Oliphint *v.* Mansfield, 36 Ark. 191; Patton *v.* Garrett, 37 Ark. 605; Wallace *v.* York, 45 Ia. 81; Lowenstein *v.* Monroe, 55 Ia. 82.

(a) Disbrow *v.* Garcia, 52 N. Y. 654; but not where no damages were shown: Randall *v.* Carpenter, 88 N. Y. 293.

(b) Jacobus *v.* Monongahela Nat. Bank, 35 Fed. Rep. 395; Copeland *v.* Cunningham, 63 Ala. 394; Bustamente *v.* Stewart, 55 Cal. 115; Vorse *v.* Phillips, 37 Ia. 428; Cretin *v.* Levy, 37 La. Ann. 182; Adam *v.* Gomila, 37 La. Ann. 479; Brinker *v.* Leinkauff, 64 Miss. 236 (but *contra* of an injunction bond in Mississippi: Baggett *v.* Beard, 43 Miss. 120); Parker *v.* Bond, 5 Mont. 1; Randall *v.* Carpenter, 88 N. Y. 293; Northampton Nat. Bank *v.* Wylie, 52 Hun 146; Alexander *v.* Jacoby, 23 Oh. St. 358; Lillie *v.* Lillie, 55 Vt. 470.

(c) Frost *v.* Jordan, 37 Minn. 544.

(d) Noble *v.* Arnold, 23 Oh. St. 264; Livingston *v.* Exum, 19 S. C. 223.

(e) Oelrichs *v.* Spain, 15 Wall. 211; Blair *v.* Reading, 99 Ill. 600; Cretin *v.* Levy, 37 La. Ann. 182.

tachment were both defeated, that no distinction could be made between them, and a reasonable attorney's fee for defending both was allowed.([a]) But in other States it has been held that where there is nothing to show that the expense of the defense was increased by the fact that an injunction was granted, the cost of defending the action could not be recovered.([b])

This distinction is often taken; if the injunction is ancillary to the principal relief, counsel fees may be recovered; but if it is the principal relief sought, no counsel fees can generally be recovered on the bond, for they were only such fees as would have been incurred in the case if no temporary injunction had been granted.([c]) But if extra expense in the way of counsel was required by a temporary injunction, that may be recovered.([d])

The expense of preparing a motion to dissolve an injunction, although the motion was not actually made, has been allowed where the preparation was made in good faith.([e]) A reasonable solicitor's fee, in opposing the granting of the injunction, is allowed in Illinois.([f]) In a case where the injunction must be dissolved at once or great damage would ensue, and in order to obtain a

([a]) Dothard *v.* Sheid, 69 Ala. 135; Wilson *v.* Root, 43 Ind. 486; Trentman *v.* Wiley, 85 Ind. 33; Hammerslough *v.* Kansas City B. L. & S. Assoc., 79 Mo. 80; Solomon *v.* Chesley, 59 N. H. 24. But not a fee paid for defending the garnishee, when the attachment was a foreign one: Flournoy *v.* Lyon, 70 Ala. 308.

([b]) Patton *v.* Garrett, 37 Ark. 605; Bustamente *v.* Stewart, 55 Cal. 115; Mitchell *v.* Hawley, 79 Cal. 301; Hovey *v.* Rubber T. P. Co., 50 N. Y. 335; Disbrow *v.* Garcia, 52 N. Y. 654; Allen *v.* Brown, 5 Lans. 511; McDonald *v.* James, 38 N. Y. Super. Ct. 76; Noble *v.* Arnold, 23 Oh. St. 264.

([c]) New National Turnpike Co. *v.* Dulaney, 86 Ky. 516; Thurston *v.* Haskell, 81 Me. 303; Olds *v.* Carey, 13 Ore. 362.

([d]) Olds *v.* Carey, 13 Ore. 362.

([e]) Wallace *v.* York, 45 Ia. 81.

([f]) Cummings *v.* Burleson, 78 Ill. 281; but *contra*, Randall *v.* Carpenter, 88 N. Y. 293; Newton *v.* Russell, 24 Hun 40.

dissolution it was necessary to procure a special train for the place where the court was in session, it was held that the expense of the train as well as the counsel fee might be recovered in an action on the injunction bond.(a)

If the injunction is dissolved only in part, while the motion was to dissolve it entirely, *all* the counsel fees paid out cannot be recovered.(b)

These expenses can be recovered only where a bond has been given. The expenses of obtaining a dissolution of an injunction cannot be recovered in the injunction suit.(c)

§ 238. Covenants and contracts of warranty or indemnity. —In an action for breach of the covenants of seizin or of warranty, the costs and, if reasonably defended, the counsel fees in the eviction suit are recoverable.(d)

The plaintiff in this action must, however, have been the one on whom the defence necessarily fell. If the litigation was in any degree voluntary on his part he cannot recover counsel fees. Thus, where a suit in equity to try the title was brought against a remote grantor, and the plaintiff, not being a party, undertook the defence at the request of his grantee, he cannot, in an action on the covenant of warranty, recover from his own grantor the counsel fees in that suit.(e)

(a) Crounse *v.* Syracuse, C. & N. Y. R.R. Co., 32 Hun 497.

(b) Ford *v.* Loomis, 62 Ia. 586.

(c) Galveston, H. & S. A. Ry. Co. *v.* Ware, 74 Tex. 47; Davis *v.* Rosedale S. Ry. Co., 75 Tex. 381.

(d) Williams *v.* Burrell, 1 C. B. 402; Rolph *v.* Crouch, L. R. 3 Ex. 44; Levitzky *v.* Canning, 33 Cal. 299; Harding *v.* Larkin, 41 Ill. 413; Robertson *v.* Lemon, 2 Bush 301; Ryerson *v.* Chapman, 66 Me. 557; Allis *v.* Nininger, 25 Minn. 525; Dalton *v.* Bowker, 8 Nev. 190; Kennison *v.* Taylor, 18 N. H. 220; Keeler *v.* Wood, 30 Vt. 242; Smith *v.* Sprague, 40 Vt. 43. *Contra*, Jeter *v.* Glenn, 9 Rich. 374; Clark *v.* Mumford, 62 Tex. 531. In Massachusetts the costs but not the counsel fees may be recovered: Leffingwell *v.* Elliott, 10 Pick. 204; Reggio *v.* Braggiotti, 7 Cush. 166.

(e) Harding *v.* Larkin, 41 Ill. 413.

The warrantor is entitled to notice of the prior suit, and an opportunity to defend it; he should not be subjected against his will to the expense of two suits. Consequently counsel fees and expenses of the prior litigation cannot be recovered unless the defendant was notified of the existence of that suit and given an opportunity to come in and defend it.[a] And if the warrantor after such notice came in to defend, the plaintiff cannot recover expenses of the former suit incurred thereafter.[b]

In an action for the breach of covenant of quiet enjoyment, the plaintiff may recover the expenses of a suit for ejectment which he defended against the owner of the paramount title,[c] or even of an unfounded suit brought by the lessor himself to recover possession.[d]

Where the defendant sold the plaintiff goods to be resold by him, and warranted them of a certain quality, it was held that the plaintiff might recover the costs of an action brought against him by a purchaser on account of the inferior quality of the goods, which could be discovered only by use.[e]

Where a defendant, pretending to be the agent of the plaintiff, sold land of the plaintiff, and the plaintiff consequently had to defend a suit for specific performance, it was held, in Illinois, that he could recover damages for the expense and trouble in the defence of that suit.[f] If the defendant has misrepresented his authority, the

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[a] Yokum *v.* Thomas, 15 Ia. 67; Point St. I. W. *v.* Turner, 14 R. I. 122.

[b] Kennison *v.* Taylor, 18 N. H. 220. But notice to the defendant is only to cast on the defendant the burden of proving the litigation unreasonable: Lunt *v.* Wrenn, 113 Ill. 168; Ryerson *v.* Chapman, 66 Me. 557.

[c] McAlpin *v.* Woodruff, 11 Oh. St. 120.

[d] Levitzky *v.* Canning, 33 Cal. 299.

[e] Hammond *v.* Bussey, 20 Q. B. Div. 79; Lewis *v.* Peake, 7 Taunt. 153; Pennell *v.* Woodburn, 7 C. & P. 117.

[f] Philpot *v.* Taylor, 75 Ill. 309.

plaintiff can recover against him the costs of an action against the supposed principal.(a)

Where the agent of an undisclosed principal is sued and defends the action, he may recover his litigation expenses from his principal.(b)

Where the plaintiff had delivered to the defendant a quantity of stone on the false and fraudulent representation of the latter that it was ordered by A., and had failed in an action against A. for the price, it was held that the plaintiff was entitled to recover from the defendant, not only the value of the stone, but also the costs incurred in the former action.(c)

The same rule that applies in actions upon covenants and contracts of warranty applies in actions upon covenants of indemnity. Thus on a bond of indemnity against the consequences of an act done by the plaintiff at the direction of the defendant, the plaintiff may recover counsel fees and other expenses of defending an action brought against him for the act.(d) In an action on an indemnity bond against liens, to defend suits and pay the judgments, the owner recovers expenses, attorney's fees, and costs, on account of the sale and in the proceedings to redeem.(e) In an action on an indemnity bond given to the sheriff on his delivery of certain chattels which various persons claimed, he can recover counsel fees paid in defending the actions by other claimants.(f)

(a) Godwin *v.* Francis, L. R. 5 C. P. 295; *acc.* Collen *v.* Wright, 7 E. & B. 301, *per* Wightman, J.; Hughes *v.* Graeme, 33 L. J. Q. B. 335.

(b) Legaré *v.* Frazer, 3 Strob. 377. (c) Randell *v.* Trimen, 18 C. B. 786.

(d) Hadsell *v.* Hancock, 3 Gray 526. But if the plaintiff had a right to demand a bond of indemnity and failed to do so, he cannot recover the costs and expenses. Russell *v.* Walker, 150 Mass. 531.

(e) Kansas City H. Co. *v.* Sauer, 65 Mo. 279; but *contra*, McDaniel *v.* Crabtree, 21 Ark. 431.

(f) Graves *v.* Moore, 58 Cal. 435.

§ 239. **Expenses must be reasonable.**—In every case, however, the expense for which it is sought to charge the defendant must appear to have been reasonably incurred.[a] The question whether one who makes a false representation, or who makes and breaks a warranty, is liable for the costs of a litigation which another engaged in, relying on such warranty or representation, will usually be determined by the fact whether the litigation was or was not the legitimate consequence of the false statement. Notwithstanding that if the statement had been true, the latter would not have brought, or would have successfully defended a suit which he in fact, relying on the truth of the statement, brought or defended unsuccessfully, yet if his doing so was not a necessary or judicious proceeding, he cannot impose the expense thus incurred on the maker of the representation or warranty.

Thus, where the defendant falsely represented that he was informed by the keeper of a public-house that it produced certain average daily returns, and the plaintiff, after having bought the good-will of the house, on the faith of such representation, discovered that its value was much less than was thus pretended, and without further inquiry sued the vendor for false representations, and failed in the action, because, as it proved, no such representation had been made by him, it was held, in an action by the purchaser against the defendant for his false representation as to what the vendor had said, that the plaintiff could not recover the costs of the action against the innkeeper, as they were not the natural or proximate consequence of the representation.[b]

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[a] Pow *v.* Davis, 1 B. & S. 220.

[b] Richardson *v.* Dunn, 8 C. B. (N. S.) 655; Merritt *v.* Nevin, 20 Up. Can. Q. B. 540.

§ 240. Plaintiff subjected to suit through defendant's breach of contract.—Where the plaintiff is forced, by reason of the defendant's breach of contract, to maintain or defend a suit, he may recover, in an action on the contract, the reasonable expenses of the former suit,[a] and this is so held in Massachusetts, though generally, in that State, the counsel fees in a former suit are not recoverable. In New Haven & N. Co. *v.* Hayden,[b] the action was for breach of contract to secure the plaintiffs a right of way. The plaintiffs subsequently acquired the right of way by the customary statutory proceedings. The plaintiff was allowed to recover the costs and expenses of settling the damages for taking the land, which included not only the ordinary legal costs and witness fees, but also attorney and counsel fees, in procuring the settlement. The cases of Leffingwell *v.* Elliott and Reggio *v.* Braggiotti,[c] were distinguished on the ground that in those cases the employment of counsel was not "a direct and necessary consequence of the breach of contract by the defendants," while here the proceedings were necessary in order to ascertain the damages. In an action for breach of contract to withdraw another suit, the costs of the defendant in that suit may be recovered.[d] Pond *v.* Harris [e] was for breach of contract to submit the plaintiff's claims to arbitrators. Although the plaintiff in fact had no claims, he was allowed to recover substantial damages, which included "the expenses to which he has been subjected by reason of his necessary preparation for a trial before the arbitrators, on ac-

(a) Dubois *v.* Hermance, 56 N. Y. 673.
(b) 117 Mass. 433.
(c) *Supra*, § 238.
(d) Hagan *v.* Riley, 13 Gray 515 (*semble*).
(e) 113 Mass. 114.

count of his own loss of time and trouble, and of employing counsel, taking depositions," etc., so far only, however, as these things *were not available* for the trial of his cause before the ordinary tribunals. The counsel fees were recoverable, it was said, for they were suitable and therefore properly incurred, and the plaintiff was deprived of the benefit of them by the wrongful act of the defendant.(a) In an action on a contract to deliver up possession, the costs of dispossessing an under-tenant of the defendant are recoverable.(b) In Proprietors of Locks and Canals *v.* Lowell H. R.R. Co.,(c) the defendant neglected to repair a bridge which he was bound to repair. The plaintiffs, however, were also bound, as against the city, to repair the bridge. The plaintiffs were allowed to recover against the defendant the amount of damages recovered by the city against them, but not the costs, in the absence of evidence that it was defended at the request of the defendants, or for their benefit, after notice and refusal on their part to come in and defend. In Iowa the costs of such a suit are recoverable where the party liable over aided in the defense of the suit, but not the costs of an appeal taken without his request.(d)

The suit in which the expense was incurred must have been the proximate result of the defendant's act. Where the mayor and council of Macon, Ga., under discretionary power given in their charter, removed the marshal from office, which removal was subsequently found to be improper, they were bound to pay his salary for the whole year; but not the money expended by him in de-

(a) *Acc.* Call *v.* Hagar, 69 Me. 521.

(b) Henderson *v.* Squire, L. R. 4 Q. B. 170. But *contra*, Morrison *v.* Darling, 47 Vt. 67.

(c) 109 Mass. 221.

(d) Ottumwa *v.* Parks, 43 Ia. 119.

fending the charges preferred. His damages were defined to be such as necessarily resulted from his amotion from office.(a) So where the plaintiff had agreed with the owner of a threshing-machine to repair it before harvest time, and employed and paid the defendant to make a fire-box needed for the repairs, which the defendant agreed to have done in about a fortnight, but failed to do, and the plaintiff had to procure one elsewhere (which he might have done in time to fulfil his contract with the owner, but did not); and having been sued by the owner, paid £20 to settle the suit, it was held that he could recover the amount he had paid the defendant for the fire-box and his additional expense in procuring another, but not the amount paid in settlement of the suit.(b)

In Baxendale *v.* London, C. & D. Ry. Co.(c) the plaintiff agreed to deliver certain pictures to one H. at Paris; the plaintiff contracted with the defendant as to part of the journey. They were lost through the defendant's negligence. It was held, reversing the judgment of the Common Pleas, that the plaintiff could not recover either the costs incurred by him, or the costs taxed against him in defending an action brought by H. against him, Lord Coleridge, C. J., saying: "It seems to me that the whole of the costs were incurred for the plaintiff's own benefit, and were not in any sense the natural and proximate result of the defendant's breach of duty"; Keating, J., also putting the decision on the ground that they were "not the proximate consequence of the defendant's breach of duty." All the judges expressed

(a) Shaw *v.* Macon, 19 Ga. 468.

(b) Portman *v.* Middleton, 4 C. B. (N. S.) 322. *Acc.* Henderson *v.* Sevey, 2 Me. 139.

(c) L. R. 10 Ex. 35.

their disapproval of Mors-le-Blanch *v.* Wilson,(a) except Lush, J., who distinguished it on the ground that, in that case, the defense was reasonable, while in the case at bar it was not. This decision was followed with reluctance in Fisher *v.* Val de Travers Asphalte Co.(b) The plaintiff, Fisher, had contracted with a certain T. to construct a tramway for him on a public road. The plaintiff then made a sub-contract with the defendant, who agreed to construct it and keep it in repair. A party who had been injured brought an action against T., which the plaintiff compromised for £70, paying, in addition, to the attorney of that party, £40 and £18 costs of action. The jury found that it was reasonable to compromise. The plaintiff in this action, brought for the defendant's failure to construct properly and keep in repair, was allowed to recover the £70, for the payment was a natural consequence of the failure to perform, but not the other items, Brett, J., however, saying: "But for the case referred to (Baxendale *v.* L., C. & D. Ry. Co.), I must confess I should have been unable to see any distinction between the damages and the reasonable costs of ascertaining their proper amount."

§ 241. **Plaintiff subjected to suit through defendant's tort.**— And in the same way where the plaintiff is liable to the injured party for a tort actually committed by the defendant, he may recover from the defendant the expense of a suit brought against him by the injured party. Westfield *v.* Mayo (c) was an action brought against the plaintiff at bar (a town) for an injury, by an obstruction to a highway created by the negligence of the defendant.

(a) L. R. 8 C. P. 227, where upon similar facts counsel fees had been allowed.

(b) 1 C. P. D. 511.

(c) 122 Mass. 100.

It was held that if the town had properly notified the defendant of the action, and had requested him to defend it, it could recover reasonable expenses incurred in defending, including counsel fees. Lord, J., said: "As a general rule, when a party is called upon to defend a suit founded upon a wrong, for which he is held responsible in law, without misfeasance on his part, but because of the wrongful act of another, against whom he has a remedy over, counsel fees are the natural and reasonably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit." The learned judge then proceeded to distinguish Reggio *v.* Braggiotti,(a) Baxendale *v.* London, C. & D. Ry. Co.,(b) and Fisher *v.* Val de Travers Asphalte Co.,(c) as follows: "When, however, the claim against him is upon his own contract, or for his own misfeasance, though he may have a remedy against another, and the damages recoverable may be the same as the amount of the judgment recovered against himself, counsel fees paid in defense of the suit against himself are not recoverable." As to the cases above cited he said: "In each of these cases it will be observed that the counsel fees were paid in defending a suit upon the party's own contract. In the present case the plaintiff was not compelled to incur the counsel fees by reason of any misfeasance or of any contract of its own, but was made immediately liable by reason of the wrong-doing of the defendant." He stated the principle to be (p. 109): "If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit, and may call

(a) 7 Cush. 166. (b) L. R. 10 Ex. 35. (c) 1 C. P. D. 511.

upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense."[a] It is to be noticed that, in Reggio *v.* Braggiotti, the amount of the taxable costs were allowed, but not counsel fees. In cases where it is criticised it seems to be looked upon merely as a decision to the effect that counsel fees cannot be allowed.

The party in fault must, however, have had notice of the former suit.[b] The defendant, a city clerk, failed to note in his index the record of a chattel mortgage; the plaintiff having examined the index and supposing the property to be unincumbered, loaned money upon it. He afterwards learned of the prior mortgage, and still later the prior mortgagee brought suit to recover the chattels. The plaintiff now sought to recover his expenses in defending that suit; but it was held that the defendant, not having been notified of the suit, could not now be charged.[c]

For refusal to place a judgment on the tax list, a plaintiff can recover expenses incurred in the employment of counsel.[d] So where the defendant wrongfully sold a promissory note made by the plaintiff and given to the defendant to use in a certain way, the plaintiff's expense of defending an action on the note in the *bona fide* belief that the holder had notice of the fraud, and the expense of effecting a settlement, may be recovered from the defendant.[e] So where a sheriff has been sued for the escape of a prisoner he may recover his costs from the

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[a] *Acc.* Ottumwa *v.* Parks, 43 Ia. 119; Chesapeake *v.* O. C. Co. *v.* Allegany County, 57 Md. 201.

[b] Lowell *v.* Boston & L. R.R. Co., 23 Pick. 24.

[c] Chase *v.* Bennett, 59 N. H. 394.

[d] Newark S. I. *v.* Panhorst, 7 Biss. 99.

[e] Osborne *v.* Ehrhard, 37 Kas. 413; Hynes *v.* Patterson, 95 N. Y. 1.

debtor; though in Massachusetts, according to the doctrine held in that State, he was not allowed his counsel fees.[a]

In an action for malicious prosecution or other malicious suit the plaintiff may recover the costs and counsel fees in defending the suit against him;[b] and in an action for false imprisonment the expenses incurred in procuring a discharge from imprisonment are recoverable.[c] But as in all cases, the plaintiff's conduct must appear to have been reasonable throughout. A vessel bound to Valparaiso, with liberty to touch at the Falkland Islands, had on board goods consigned to those islands and several hundred barrels of gunpowder for Valparaiso. At the islands, it having been necessary for her to unload the gunpowder before entering the harbor, the defendants furnished a vessel on which the powder was stowed, but afterward removed the powder to another vessel unfit for the purpose, which went down with it. The captain, after his arrival at Valparaiso, having been sued by the consignees, defended the action unsuccessfully. It was held that the defendants, although liable for the value of the gunpowder, were not liable for the costs of defending the action at Valparaiso, it not appearing that the conduct of the captain was prudent in so doing.[d]

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[a] Griffin *v.* Brown, 2 Pick. 304.

[b] Lawrence *v.* Hagerman, 56 Ill. 68; Krug *v.* Ward, 77 Ill. 603; Ziegler *v.* Powell, 54 Ind. 173; McCardle *v.* McGinley, 86 Ind. 538; Lytton *v.* Baird, 95 Ind. 349; Gregory *v.* Chambers, 78 Mo. 294; Magmer *v.* Renk, 65 Wis. 364. But in Georgia, in an action for *malicious distress proceedings*, the tenant cannot recover expenses incurred in procuring his stock to be declared exempt under Georgia laws. Sturgis *v.* Frost, 56 Ga. 188.

[c] Pritchett *v.* Boevey, 1 Cr. & M. 775; Foxall *v.* Barnett, 2 E. & B. 928; Blythe *v.* Tompkins, 2 Abb. Pr. 468; Parsons *v.* Harper, 16 Gratt. 64; Bonesteel *v.* Bonesteel, 30 Wis. 511. But *contra*, Bradlaugh *v.* Edwards, 11 C. B. (N. S.) 377.

[d] Ronneberg *v.* Falkland I. Co., 17 C. B. (N. S.) 1. Erle, C. J., also expressed the opinion that these damages were too remote.

CHAPTER VIII.

THE MEASURE AND ELEMENTS OF VALUE.

§ 242. Value in general.
243. Fundamental rule of value.
244. Market value.
245. Market value, how determined.
246. Value in the nearest market.
247. Cost of transportation—Allowance of profit.
248. Property in process of manufacture.
249. Market value artificially enhanced.
250. No market value.
251. Peculiar value—*Pretium affectionis.*
252. Value for a particular use.
§ 253. Possible future use.
254. Value of good-will.
255. Time and services.
256. Choses in action — Bills and notes.
257. Bonds and shares of stock.
258. Other securities for the payment of money.
259. Policies of insurance.
260. Other sealed instruments.
261. Documents.
262. Title deeds.
263. Life.
264. Money.
265. Illegal and noxious property.

§ 242. **Value in general.**—In almost all cases in which damages are recoverable, the measure of compensation involves an inquiry into the question of value. The plaintiff is to be compensated for some article of property lost, appropriated, destroyed, or injured, for the breach of some contract to be measured in terms of the value of property, or for some tort affecting the value of property. When his damages involve the consideration of time, labor, or services, it is the pecuniary value of these which must be analyzed; and even when the recovery is based on personal injury, a part of the damages at least must be made up of the pecuniary elements, such as the value of his time and labor lost, the value of the time and labor expended in surgical aid, the value of the medicine administered, etc., etc. It is in fact only when

we attempt to estimate the damages for pain and suffering or to assess what are called exemplary damages that we pass beyond the region of value in its true pecuniary sense. It will accordingly be found that one of the questions with which the courts are most constantly occupied in cases involving the measure of damages is how to arrive at and measure the value involved. For example, in the ordinary case of the value of property, is it the market value or the cost of production? Is it the value at the nearest market, or may other and distant markets be also consulted? Is it the peculiar value to the owner, or the value for some particular purpose? It is proposed to consider these questions here, and so far as possible to state the rules by which the courts determine the elements and measure of value in particular cases.

§ 243. **Fundamental rule of value.**—One fundamental principle may be stated at the outset, and we shall find frequent examples of it as we proceed with our examination; and that is, that wherever the measure of damages involves the question of value, however much the market may be resorted to to determine what the value is, this resort is had, not as a conclusive test, but to aid in getting at that real value to which the plaintiff is entitled. What he is entitled to recover is the real value of the article of property, the time, the labor, or the services, as they would be if unaffected by the defendant's tort or if the defendant's contract had been performed. If these things are bought and sold in the market, the market price shows what it would cost the plaintiff to be put in as good a position as if the tort has not been committed or as if the contract had been performed. To take the most familiar of all illustrations, in the case of failure to deliver an ordinary article of commerce sold, the vendee can replace himself by buying the article in the market.

Hence his measure of damages is invariably said to be the market value. But as the cases now to be examined will show, the rule, more exactly stated, would be that his measure of damages is the *value* of the article. The market price is merely one of the commonest tests by which to ascertain this value. It is by no means the only one.

§ 244. **Market value.**—As just stated, where one is entitled, in any form of action, to compensation based on the value of an article of property, the measure of recovery, where such property can be procured in the market, is the value of it in the market and not the cost;[a] for the owner of property is fully compensated for it by a sum of money which will enable him to replace it. The market value must be ascertained by a money standard based on evidence. It cannot be assessed on conjecture.[b] It is the actual cash market value, not what the property would sell for under special or extraordinary circumstances.[c] Proof of a single sale is not enough to establish a market value.[d] The "market value" of an article requires the investigation of the actual condition of the market, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist, *e. g.*, a probable fall in the price of the article in question, which would have resulted had the defendant delivered the quantity specified in the contract to the plaintiff, and had the plaintiff offered it for sale in the market. The principle on which the rule rests is the in-

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[a] New Orleans, J. & G. N. R.R. Co. *v.* Moore, 40 Miss. 39; Gunn *v.* Burghart, 47 N. Y. Super. Ct. 370.

[b] Fraloff *v.* New York C. & H. R. R.R. Co., 10 Blatch. 16.

[c] Brown *v.* Calumet R. Ry. Co., 125 Ill. 600; McCuaig *v.* Quaker City Ins. Co., 18 Up. Can. Q. B. 130.

[d] Graham *v.* Maitland, 1 Sweeny 149.

demnification of the injured party for the injury which he has sustained. A complete indemnity requires that the vendee should receive the sum which, with the price he had agreed to pay, would enable him to buy the article which the vendor had failed to deliver. The value in the market on the day forms the readiest and most direct method of ascertaining the measure of this indemnity in both cases; and accordingly, where a market value for the article exists, the law has adopted that standard.

§ 245. **Market value, how determined.**—In a case on the Pennsylvania Circuit,[1] where suit was brought on a contract to deliver coffee, not paid for, the rule was declared to be the market price on the day fixed for performance; but it also became necessary carefully to determine what was the market price. A motion was made to set aside the verdict on the ground of excessive damages, which was granted, and in delivering his opinion, Hopkinson, J., said:

"It is the price, the market price of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the value, the rate at which the thing is sold. To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value provided the rumor shall prove to be true. In such a case it is clear that the asking price is not the worth of the thing on the

[1] Blydenburgh *v.* Welsh, 1 Baldwin 331, 340.

given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit by a breach of the contract, which he never could have made by its performance.

"The law does not intend this; it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter."

§ 246. **Value in the nearest market.**—If there is no market for the article at the place where the plaintiff would be entitled to compensation, the value at the nearest market governs. In addition to this, the cost of transportation of the property to the place of compensation is usually to be added,[a] and in some cases an allowance for profit.[b]

Grand Tower Co. *v.* Phillips[c] was an action for breach of contract to deliver coal at Grand Tower. The defendant company had the monopoly of the coal market at Grand Tower. It was held error to charge the jury that the measure of damages was the cash value of the kind of coal mentioned at Cairo or points below on the Mississippi River, after deducting the contract price of the coal and the cost and expenses of transporting it thither. Bradley, J., said, that although the defendant probably would have got those prices, yet the rule was the difference between the contract price and the price at the nearest available market (to Grand Tower) where it

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[a] O'Hanlan *v.* Great W. Ry. Co., 6 B. & S. 484; 34 L. J. (N. S.) Q. B. 154; Bullard *v.* Stone, 67 Cal. 477; Sellar *v.* Clelland, 2 Col. 532; Furlong *v.* Polleys, 30 Me. 491; Berry *v.* Dwinel, 44 Me. 255; Rice *v.* Manley, 66 N. Y. 82; Wemple *v.* Stewart, 22 Barb. 154. In the latter case it appears that the value in near *and distant* markets was shown. The cost at the nearest available market, it seems, should be the only criterion.

[b] O'Hanlan *v.* Great W. Ry. Co., 6 B. & S. 484; 34 L. J. (N. S.) Q. B. 154.

[c] 23 Wall. 471.

could have been obtained, with the addition of the increased expense of transportation and hauling.

It may, however, be that the cost of transportation is to be subtracted from the value at the nearest market instead of added to it. That depends on whether the nearest market is resorted to by persons from the place where the plaintiff is entitled to the property for purchase or for sale; that is, whether the value in that market is less or greater than the value where the property should be. This is a question of fact which will never prove to be difficult of proof; the facts of the case will determine it. So where goods are purchased with a view to sending them for sale to a neighboring market, and there is no market price at the place of delivery, the market price at the place to which they were to be sent, less the cost of transportation, is the measure of their value at the place of delivery;[a] and knowledge on the part of the vendor of the destination is not necessary.[b] If, however, it is not proved that the market is in fact the *nearest*, such knowledge would seem to be necessary.[c] So in an action on the defendant's promise to pay for logs which he had converted on their way down the river to the plaintiff's mill, evidence is admissible of their market price at the mill, and of the cost of their transportation from the place of conversion thither.[d] In Harris *v.* Panama R.R. Co.[e] the question was much considered. The plaintiff's race-horse was injured while being transported across the isthmus of

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[a] Johnson *v.* Allen, 78 Ala. 387.

[b] McDonald *v.* Unaka T. Co., 88 Tenn. 38; Hendrie *v.* Neelon, 12 Ont. App. 41.

[c] Cockburn *v.* Ashland Lumber Co., 54 Wis. 619.

[d] Saunders *v.* Clark, 106 Mass. 331

[e] 58 N.Y. 660.

Panama. The evidence showed that the horse could have been sold at the isthmus for some price, but properly speaking there was no market price. The place of destination was San Francisco. Evidence of the value of the horse at San Francisco was admitted, "to enable the jury to estimate the value at the time and place of injury." The court said that the market value at the time and place is the proper evidence of value, but that it is reliable only where "it appears that similar articles have been bought and sold, in the way of trade, in sufficient quantity or often enough to show a market value." It was further said that in the absence of such proof, the market value in some other place is evidence, and the best evidence is the value at the place of destination, but that a great deduction should be made for the risk and expense of further transportation. It is said by the Supreme Court of Georgia to be the legal presumption, in the absence of positive evidence, that a commodity is worth as much at the place of destination as at that of shipment; and in an action against a carrier for the loss of cotton, where the plaintiff, instead of proving the former of these values, proved the latter only, it was held by that court that the defendant, not having contradicted this evidence, could not justly complain.([a])

Where the value of a stranded vessel was to be determined, the Supreme Court of Massachusetts held that her value at a neighboring port should be taken as a basis, and that reasonable allowance should be made for the probable cost of getting her off, repairing her, and getting her to market, and for the risks and chances of getting her afloat and to market; and also a reasonable allowance

([a]) Rome R.R. Co. *v.* Sloan, 39 Ga. 636; *acc.* South & N. A. R.R. Co. *v.* Wood, 72 Ala. 451; Echols *v.* Louisville & N. R.R. Co., 7 So. Rep. 655 (Ala.); Richmond *v.* Bronson, 5 Denio 55.

for her diminution in value on account of her having been ashore.(a)

§ 247. **Cost of transportation—Allowance for profit.**—It will be seen from the foregoing cases that there is no absolute rule fixing the value in the nearest market as the *measure of recovery* when there is no market value at the place of compensation. In some cases the cost of transportation (including, of course, all expenses such as freight and insurance) is added, while in others an allowance for a profit which it is presumed would have been made had the breach of contract or tort never occurred is given, the object of these allowances being to reach an estimate of what the real market value at the place of compensation would have been, had there been one. In other cases again, where it appears that the nearest market value is swollen by some item of cost which could not in the nature of things enter into the market value at the place of compensation had there been one, this is subtracted. In other words, the object of the court being to get at what ought to be considered the real market value at the place of compensation, it takes in the absence of any such market the nearest market value as a part of the proof going to establish this.

§ 248. **Property in process of manufacture.**—Very similar to the foregoing are a class of cases where the value of goods in process of manufacture is to be obtained; here the measure is the value of the completed goods, less the cost of completing the manufacture.(b)

§ 249. **Market value artificially enhanced.**—A question in regard to the "market value," not yet, so far as we are aware, directly decided, but which the operations of stock speculators are likely sooner or later to bring before the

(a) Glaspy *v.* Cabot, 135 Mass. 435.
(b) Emmons *v.* Westfield Bank, 97 Mass. 230.

courts, is this, namely: Whether the rule which makes the "market value" the measure of damages in ordinary cases of breach of contract for the delivery of goods, is applicable to certain cases of contract for the delivery of stocks, where their value in the market is neither determined by their intrinsic value nor regulated by the natural laws of demand and supply, but is artificially inflated by the seller for the purpose of increasing his profit. It is not unfrequently the case that certain capitalists combine secretly to buy up the stock of a particular railroad or other corporation, and in this way get the whole, or nearly the whole, of it into their possession or control, so that substantially it can only be purchased from them, or by their permission. Having done this, they induce other parties to agree to sell them stipulated amounts of the stock "short," as it is called in the technical jargon of stock operators—that is, to sell them at an agreed price, deliverable on or before a certain day, stock not owned or possessed by the seller at the time of making the agreement of sale. This agreement is made by the seller in the hope or expectation of purchasing the stock before the stipulated day at a lower price than that at which he has contracted to sell. Before that day comes, however, as the stock is wholly in the buyer's control, or so far in his control that it is impossible to procure in the general market an amount of it sufficient to satisfy the contract, the seller finds himself obliged to procure it from the buyer himself, or on the buyer's own terms, and at a price immensely beyond its actual value, and sometimes exceeding by one or more hundred per cent. what its market value was immediately before the transaction, and, of course, exceeding in a similar ratio the price at which he had agreed to deliver it. Perhaps the courts would be disposed to disregard, in such a case, the quotations in the

market. In the cases to which we refer, the buyer cannot fairly be said to have lost anything more than the actual value of the stock by its non-delivery, and the so-called "market value," which is the result of his own secret machinations, furnishes no measure of actual damage. "A mere speculative price," observed Nelson, J., "got up through the contrivance of a few interested dealers, with a view to control the market for their own private ends, is not the true test." ([a]) In Kountz *v.* Kirkpatrick ([b]) the Supreme Court of Pennsylvania said: "The market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value because it is a common test of the ability to purchase the thing. . . . . What is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated."

§ 250. **No market value.**—If an article has no market value, the real value of it must be determined in some other way from such elements of value as are attainable. ([c]) "If at any particular time there be no market demand for an article, it is not on that account of no value. What a thing will bring in the market at a given time is perhaps the measure of its value then, but not the only one." ([d]) "The market price, in the ordinary sense, is generally, but not always, the test of value. For such a tort as a conver-

([a]) Smith *v.* Griffith, 3 Hill 333.
([b]) 72 Pa. 376, 387, 390, *per* Agnew, J.
([c]) Murray *v.* Stanton, 99 Mass. 345.
([d]) Strong, J., in Trout *v.* Kennedy, 47 Pa. 387, 393.

sion of goods a plaintiff may be entitled to large damages, though unable to sell the goods at any price. He may be greatly injured by the loss of goods which he cannot sell, but which would be productive of great benefit, and therefore would be of great value, without a sale."([a]) In Brown *v.* St. Paul M. & M. Ry. Co.,([b]) it was held that the value of an annual pass over a railroad was so difficult of measurement that it could not be allowed as damages. It would seem, however, that mere difficulty in computing value should not prevent the recovery of it. In Pennsylvania the value of a pass for life over a railroad for an entire family has been allowed.([c]) The court said: "It is true it is difficult to estimate its value because of two uncertainties—one the length of life and the other the number of passages he and his family would probably demand. Still this uncertainty, like many others, must be made to approximate certainty as closely as the nature of the case will admit of. The burthen of proof lay on the plaintiff, who knew the number of his family, and the customary number of trips made by himself and them."

§ 251. **Peculiar value—Pretium affectionis.**—It may happen that the property is of such a nature that it cannot be replaced at all, or only with difficulty; for example, a family portrait. In that case "the just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."([d]) But this "actual

([a]) Doe, J., in Hovey *v.* Grant, 52 N. H. 569, 581.

([b]) 36 Minn. 236.

([c]) Erie & P. R.R. Co. *v.* Douthet, 88 Pa. 243, 246.

([d]) Morton, J., in Green *v.* Boston & L. R.R. Co., 128 Mass. 221, 226; *acc.* Houston & T. C. R.R. Co. *v.* Burke, 55 Tex. 323.

value to the owner" means its value as a painting, not the satisfaction and pleasure which the possession of it gives. That feeling, like the satisfaction which comes from having a contract respected and performed, is of a nature which the law does not recognize as a subject for compensation. In other words, a *pretium affectionis* can never be recovered.(a)

Other considerations than market value may govern the measure of compensation for household goods, wearing apparel, and such things as have a peculiar value to the owner. In an action against a carrier for the loss of second-hand clothing, books, and table furniture the Supreme Court of Texas said:(b) "He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would form the proper rule on which he should recover. Not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family." In a similar case in the Supreme Court of Colorado, Stone, J., said:(c)

"As to certain other goods, such as wearing apparel in use, and certain articles of household goods and furniture, kept for

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(a) Moseley *v.* Anderson, 40 Miss. 49.

(b) International & G. N. Ry. Co. *v.* Nicholson, 61 Tex. 550, 553, *per* Willie, C. J.

(c) Denver, S. P. & P. R.R. Co. *v.* Frame, 6 Col. 382, 385; *acc.* Fairfax *v.* New York C. & H. R. R.R. Co., 73 N. Y. 167.

personal use and not for sale, while they have a real intrinsic value to the owner, they may have little or no market value whatever at the point of destination ; they are not shipped as marketable goods. The market value of many such articles depends on style and fashion, irrespective of actual value for use. In some cases the owner may not be able to replace them in any market. In such cases the value is to be properly fixed by considerations of cost and of actual worth at the time of the loss, without reference to what they could be sold for in a particular market or hawked off for by a second-hand dealer where they happen to be unladed."

The mere fact that the goods are second-hand goods does not bring them within this rule : the reason of it is, that the goods have a certain adaptability to the purpose for which they are used, which no other goods could have. If other goods can be bought at second-hand stores in the neighborhood which are equally suited to the purpose, the market price of such second-hand goods is the measure of compensation.([a])

§ 252. **Value for a particular use.**—The value of property is to be estimated with reference to the most remunerative use for which it is adapted. Thus where a building was equipped with power and fitted for a machine-shop, but was used by the defendant merely for storage, the owner, in an action for use and occupation, was allowed to recover the value of the premises as a machine-shop, not merely their value for storage.([b]) So in New Jersey, where the value of a horse was in question, Whelpley, C. J., said : ([c]) " They were entitled to have the value of the horse as a horse to be used in their business, and fitted for that use. Perhaps he would not have been worth anything as a fast trotter or as a gentleman's carriage horse,

([a]) Iler *v.* Baker, 46 N. W. Rep. 377 (Mich.).
([b]) Horton *v.* Cooley, 135 Mass. 589.
([c]) Farrel *v.* Colwell, 30 N. J. L. 123, 127.

because not adapted to the work; but that would not depreciate his value as a cart horse, for which purpose he was to be used."[a] In Collard *v.* Southeastern Ry. Co.,[b] some hops, consigned to a purchaser, were injured in transit by the rain. They were dried, and after this process they were as valuable for use as before the wetting, but not as valuable for sale. The consignor was allowed to recover from the carrier their depreciation in value for sale. In a case in Massachusetts, the defendant ordered goods for a certain purpose; goods were furnished which were not adapted for the purpose, and were retained by the defendant with knowledge of that fact. The plaintiff was allowed to recover the value of the goods in general (that is, for the most remunerative use for which they were clearly adapted), and not their value for the special use for which they were ordered but were not adapted.[c]

§ 253. **Possible future use.**—The present value of property may be enhanced by the possibility of making a more remunerative use of the property than the present use. Such possible future use is to be considered.[d] In Montana Ry. Co. *v.* Warren,[e] the Supreme Court of Montana said: "The respondent was allowed to prove the value of the land for town-lot purposes. He had the right to do so, whether he had built upon it or not. As we have seen, the question is not to what use the land had been put. The owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether or not

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[a] *Acc.* Central B. U. P. R.R. Co. *v.* Nichols, 24 Kas. 242.

[b] 7 H. & N. 79.

[c] Bouton *v.* Reed, 13 Gray 530.

[d] Moore *v.* Hall, 3 Q. B. D. 178; Holland *v.* Worley, 26 Ch. D. 578; Ellington *v.* Bennett, 59 Ga. 286; Reed *v.* Ohio & M. Ry. Co., 126 Ill. 48; Shenango & A. R.R. Co. *v.* Braham, 79 Pa. 447.

[e] 6 Mont. 275, 284, *per* Bach, J.

he so used it." In Mississippi & R.R. Boom Co. *v.* Patterson,(a) the plaintiff in error had taken land of the defendant in error by the right of eminent domain, and compensation was sought in this action. The jury found that the land was worth but $300 for any other than boom purposes, but a very much larger sum for such purposes: and the Supreme Court of the United States held that the larger sum should be awarded. Field, J., said:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

This question usually arises in cases of condemnation of land for public purposes, under the statutes of eminent domain, and will be examined more in detail hereafter. Of course it is not intended to imply that any speculative possibility can be considered, but only such possible fut-

(a) 98 U. S. 403, 407.

ure use as will be considered to enter into and affect the present market value.

§ 254. **Value of good-will.**—The good-will of a business has an established value, which in the proper case may be estimated by a jury.[a] A basis for such an estimate is proof of the past profits; but an amount based on such an estimate may be reduced by showing such depression in trade or other circumstances as would make the business less valuable.[b]

In Llewellyn *v.* Rutherford [c] the method of determining the value of the good-will of premises is discussed. The plaintiff had had possession of the premises under a lease in which there was a proviso that at the expiration the defendant should pay the best he could get for the good-will of the business. On regaining possession, the lessor relet the premises to a third party for the same use to which the plaintiff had put them. Coleridge, C. J., said, that as the defendant had not sold the good-will, the amount of recovery should be such a sum as persons who are in the habit of estimating such things would fix as the value of the good-will of the premises under ordinary circumstances. It was held that in estimating the amount, the improved value of the neighboring property could be taken into consideration as increasing the value. What is called in this case the good-will of premises resembles very closely the good-will of a business: indeed, it could probably be resolved into two simpler elements—the value of the lease, and the good-will of the business carried on. The rule laid down by Coleridge, C. J., indicates another method of placing before the jury a basis upon which to estimate the value of good-will.

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[a] § 182.
[b] Chapman *v.* Kirby, 49 Ill. 211.
[c] L. R. 10 C. P. 456.

§ 255. **Time and services.**—When the value of the time of a man, or of his personal services, is to be found, the jury must determine, in the light of all the circumstances proved, what the value of such a man's labor is worth. In the case of a common laborer the matter is simple: the value of his time or services is governed by the current rate of wages. Where, however, the value of the services is enhanced by the skill or education of the man whose time is to be paid for, the case is one of more difficulty. Where compensation is sought for services, the value of the services is not governed by the benefit actually received from them;[a] nor is the value of time necessarily measured by the compensation which it was bringing in at the time of the injury.[b] The value of time and services, where there is no current rate applicable to the case, must be fixed by the jury; and the past earnings of the party may be shown, not as fixing the value in themselves, but as evidence to assist the jury in fixing it.[c]

§ 256. **Choses in action—Bills and notes.**—The value of a bill or note is *prima facie* the amount due on the security,[d] the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security.[e]

[a] Stowe *v.* Buttrick, 125 Mass. 449.

[b] Fisher *v.* Jansen, 128 Ill. 549.

[c] See cases cited, § 180.

[d] Evans *v.* Kymer, 1 B. & A. 528; St. John *v.* O'Connel, 7 Port. 466; Ray *v.* Light, 34 Ark. 421; American Ex. Co. *v.* Parsons, 44 Ill. 312; Buck *v.* Leach, 69 Me. 484; Hersey *v.* Walsh, 38 Minn. 521; Menkens *v.* Menkens, 23 Mo. 252; Bredow *v.* Mutual S. I., 28 Mo. 181; Decker *v.* Mathews, 12 N. Y. 313; Metropolitan E. Ry. Co. *v.* Kneeland, 120 N. Y. 134; Ramsey *v.* Hurley, 72 Tex. 194; Robbins *v.* Packard, 31 Vt. 570; McDonald *v.* Everitt, 3 Kerr 569.

[e] Zeigler *v.* Wells, 23 Cal. 179; American Ex. Co. *v.* Parsons, 44 Ill. 312; Latham *v.* Brown, 16 Ia. 118; O'Donoghue *v.* Corby, 22 Mo. 393; Potter *v.* Merchants' Bank, 28 N. Y. 641; Cothran *v.* Hanover Nat. Bank, 40 N. Y. Super. Ct., 401.

But the maker himself cannot give evidence of his pecuniary circumstances to reduce the damages.(a)

Lord Ellenborough held[1] that the damages in actions for bills of exchange were to be estimated at the amount of the principal and interest due on the bills at the time of the demand and the refusal; in other words, at the time of conversion. No doubt seems to have been entertained that the face of the bills was the *prima facie* measure of damages; and the same point was ruled in New York, with no limitation, however, as to the time to which interest was to be computed.[2]

Where trover was brought to recover a bill of exchange for £1,600, which the bankrupt had deposited with the defendant, and on which, after a demand had been made for it and refused, he had raised the sum of £800, it was insisted that the damages should be only this latter sum; but it was held otherwise at the trial; and upon argument for a new trial, Lord Abinger, C. B., said: "If the defendant will bring £800 into court and deliver up the bill, the verdict may be entered for a nominal sum; but he converted the whole bill, and the plaintiffs are entitled to recover the value of the whole at the time of the conversion. The defendant cannot be less liable for having destroyed the property to the amount of one half."[3]

In an action of trover for certain *billetes*,[4] being Peruvian paper money, it appeared that the billetes were at a great discount; but the matter being referred to the prothonotary for adjustment, the plaintiffs insisted, on

[1] Mercer *v.* Jones, 3 Camp. 477.

[2] Ingalls *v.* Lord, 1 Cowen 240. It should, perhaps, be noticed, that, in this case, the defendant was a constable, who had illegally levied on the note in question; and the court said, "that it viewed with great jealousy the conduct of officers holding executions against defendants."

[3] Alsager *v.* Close, 10 M. & W. 576.

[4] Delegal *v.* Naylor, 7 Bing. 460.

(a) Stephenson *v.* Thayer, 63 Me. 143; Outhouse *v.* Outhouse, 13 Hun 130; Robbins *v.* Packard, 31 Vt. 570; Kalckhoff *v.* Zoehrlaut, 43 Wis. 373.

affidavit, that the billetes were worth *to them* the value expressed on their face, and claimed a recovery to that amount. And the court allowed it. This, however, hardly seems in analogy to other cases; for the general rule which we have laid down is to be taken with the qualification that the note, or other chose in action, is still an available security for the amount claimed.

Where[1] trover was brought for a £300 check, drawn by the bankrupt on his bankers, and delivered after his bankruptcy to the defendant, a creditor, and paid by the drawees, the jury found a verdict for the face of the bill. On a motion to set aside the verdict and enter a nonsuit, Chambre, J., said: "How can you sue for a piece of paper of no value?" and Mansfield, C. J., said: "The plaintiffs proceed on the ground that the check is worth nothing, being drawn without authority; how can they recover on it the sum of three hundred pounds?" and a nonsuit was entered. In Thayer *v.* Manley (a) the defendant had obtained from the plaintiff three promissory notes by false representations. The plaintiff, on discovering the fraud, and before the maturity, demanded their return; on refusal, brought an action for their conversion. The court held, that, as the defendant might, by transfer to a *bona fide* purchaser, render the plaintiff liable to pay the notes, the measure of damages was their face value, and this was not changed by the fact that, after the commencement of the action and before the trial, one fell due and had not been transferred. It held, however, that the defendant might have the option of satisfying the judgment by delivering up and cancelling the notes. Where the defendants converted a note, by transferring it to a *bona fide* purchaser, and a recovery

[1] Mathew *v.* Sherwell, 2 Taunt. 439.

(a) 73 N. Y. 305.

was had against the plaintiff, it was held he could recover the amount paid to satisfy the judgment.([a])

As we have seen, a defendant, in trover for a note, can show the insolvency of the maker, and any evidence will be admitted which tends to show such insolvency. A mere probability that a note would not have been paid, is perhaps not enough; ([b]) but evidence is admissible to show that the plaintiff took the necessary steps to present the note for payment, and that the makers resided at the place in which the bank was situated and at which the note was payable.([c])

Since a material alteration releases the parties to a note from liability, only nominal damages can usually be recovered for the conversion of an altered note. But a qualification of this general rule was made in the case of Booth *v.* Powers.([d]) The evidence showed that a note made payable to "A or order" had been changed so as to read to "A or bearer." It was held that that material alteration invalidated the note, and therefore reduced its value and the damages for its conversion. Folger, J., said that the alteration must be one that would vitiate the instrument. He pointed out that if the alteration was not fraudulent, the payee might resort to the original indebtedness, but in that case he must have the note, and the note would therefore be worth the amount of the original indebtedness. He further said, that the plaintiffs could also show a readiness by the makers to waive or ratify the alteration. So if in any case the note was available to the plaintiff to its full amount, that amount will remain the measure of damages.([e])

([a]) Comstock *v.* Hier, 73 N. Y. 269.
([b]) Knapp *v.* U. S. & C. Ex. Co., 55 N. H. 348.
([c]) Brown *v.* Montgomery, 20 N. Y. 287.
([d]) 56 N. Y. 22.
([e]) Rose *v.* Lewis, 10 Mich. 483.

§ 257. **Bonds and shares of stock.**—In the case of bonds of a municipal or other corporation having a market value, such value is the measure of compensation.([a]) So in an action for the conversion of some San Francisco Waterworks Company's bonds, the plaintiff was held not to be confined in his recovery to the face value of the bonds, on the assumption that the Waterworks would pay them in legal tender, as allowed by the United States statutes. The jury could, it was said, take into consideration the fact that the company received all its dues in gold, that gold was practically the currency of California, and any other facts from which the probability that they would be paid in gold could be estimated. Johnson, C., said: "These considerations go to fix the market value where there is one. In the absence of an actual market value, I know no reason why they may not be considered by any tribunal."([b])

In the same way the value of a certificate of stock in a corporation is the market value of the shares, if they have a market value.([c]) Where there is no market value, the value of shares must be found by an examination of the affairs of the company.([d]) Here, as elsewhere, the market value is not an absolute standard. The market is only taken as usually the best indication of value. This it may not be at all. So where in an action

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([a]) Hayes *v.* Massachusetts L. I. Co., 125 Ill. 626 (*semble*); First National Bank *v.* Strang, 28 Ill. App. 325; Callanan *v.* Brown, 31 Ia. 333; Griffith *v.* Burden, 35 Ia. 138; Wintermute *v.* Cooke, 73 N. Y. 107 (*semble*); Roberts *v.* Berdell, 61 Barb. 37.

([b]) Simpkins *v.* Low, 54 N. Y. 179.

([c]) Deck *v.* Feld, 38 Mo. App. 674; Ormsby *v.* Vermont C. M. Co., 56 N. Y. 623 (*semble*); Delany *v.* Hill, 1 Pittsburgh 28; Connor *v.* Hillier, 11 Rich. 193.

([d]) Deck *v.* Feld, 38 Mo. App. 674; *acc.* Huse & Loomis Ice Co. *v.* Heinze, 14 S. W. Rep. 756 (Mo.), where the value of stock in a *projected* corporation was to be found.

for damages by the vendee, of stock purchased in consequence of the vendor's false representations as to its intrinsic value, it appears that the stock was *actually* worthless, the price at which it sold in the market is entitled to no weight on the question of value.[a] In a case of this sort in the English Court of Appeal,[b] Cotton, L. J., said: "It must not be taken that the value of the shares must be what they would have sold for in the market, because that might not show the real value at all. I do not know whether there was any market in this case, but the market might have been affected by the representations which were made by the defendants, which induced the plaintiff to act and which might have induced others to act." And Sir J. Hannen added that the value was "not what the shares might have sold for, because he was not bound to sell them, and subsequent events may show that what the shares might have sold for was not their true value, but a mistaken estimate of their value."

In Redding *v.* Godwin,[c] a case of the same nature, Dickinson, J., said:

"If such property has a definite market value, for which it can be readily sold, that is to be taken as its value, as in the case of other kinds of property. The market value and the intrinsic value are not necessarily the same. It is contended that, in the absence of proof of the market value of the stock, or that it had no market value, a recovery cannot be predicated upon proof of its intrinsic value. If it were shown that the stock was of no intrinsic value, it would be inferable that it had no market value.[d] And while it may be possible that the stock of an insolvent private corporation, a corporation which is unable to

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[a] Hubbell *v.* Meigs, 50 N. Y. 480.
[b] Peek *v.* Derry, 37 Ch. Div. 541, 591.
[c] 46 N. W. Rep. 563 (Minn.).
[d] Miller *v.* Barber, 66 N. Y. 558, 568.

discharge its liabilities in the usual course of business, may have some definite market value different from its intrinsic value, this is not to be presumed ; and in such a case the intrinsic value, ascertained from the value of the corporate assets, and the amount of its liabilities, may be taken as the basis for the assessment of damages. If in fact such stock had a definite market value different from its intrinsic worth, that may be shown by the adverse party."

§ 258. **Other securities for the payment of money.**—So the value of a savings-bank book is *prima facie* the amount of the deposits ; (a) the value of an account is *prima facie* the face value.(b) For failure to give security for a purchase, the value of the security is the measure of damages, and that is *prima facie* the amount of the sum to be secured.(c)

§ 259. **Policies of insurance.**—The value of a policy of insurance was involved in an action to recover damages for the fraud of an agent, who had represented to his principal that he had effected an insurance, when in fact he had not. In trover for the policy, Lord Mansfield would not permit the defendant to contradict his own representation, and laid down the rule of damages as being the same as if the policy had been actually effected. " I shall consider," he said, " the defendant as the actual insurer, and therefore the plaintiff must prove his interest and loss." [1] So, on the Pennsylvania circuit,[2] in an action of trover for a policy of insurance, by consent of parties, the rule of damages was considered the same as if the suit had been on

[1] Harding *v.* Carter, Park on Insurance, 4.

[2] Kohne *v.* The Insurance Co. of North America, 1 Wash. C. C. 93.

(a) Wegner *v.* Second W. S. Bank, 76 Wis. 242.

(b) Sadler *v.* Bean, 37 Ia. 439.

(c) Barron *v.* Mullin, 21 Minn. 374.

the policy.(a) In Wheeler *v.* Pereles,(b) it was held, in an action for the conversion of a life insurance policy by the pledgee, that the measure of damages was the value of the policy less the amount of the notes for which it was pledged. But where an action of trover was brought[1] for a policy which it appeared was cancelled, a verdict was recovered and sustained for *2d.*, the value of the parchment only.

§ 260. **Other sealed instruments.**—Where the defendant[2] agreed to purchase of the plaintiff, for £73 19*s.*, the unexpired term of a lease of twenty years, and the plaintiff delivered to him the indenture of lease for the purpose of having an assignment made out, the defendant subsequently made an agreement with the original landlord, and broke off the bargain with the plaintiff, and declined to accept an assignment. The plaintiff demanded the lease (but not the purchase-money), which, being refused, he brought trover. The jury found a verdict for £73 19*s.*, the price agreed on as the value of the lease, deducting the amount of some fixtures which the plaintiff's undertenant had removed, and no question was made but the measure of damages was correct. So, where[3] the defendant had executed a bond to one H. Clowes, which was assigned to the plaintiff, in the penalty of $1,000, conditioned to convey a lot of land. Trover was brought for this instrument, and the conversion proved. The plaintiff having been nonsuited at the trial, on the ground that

[1] Wills *v.* Wells, 8 Taunt. 264.
[2] Parry *v.* Frame, 2 B. & P. 451.
[3] Clowes *v.* Hawley, 12 Johns. 484.

(a) *Acc.* Hayes *v.* Massachusetts L. I. Co., 125 Ill. 626, where for conversion of the policy after the death of the assured the face value of the policy was given.

(b) 43 Wis. 332, citing Halliday *v.* Holgate, L. R. 3 Ex. 299; Fisher *v.* Brown, 104 Mass. 259.

none but nominal damages could be given, the court set the nonsuit aside, saying that the plaintiff, as the assignee of the obligee, having been entitled to the performance of the condition, the damages sustained would be the value of the land. From this amount must be subtracted the cost of performing a condition attached to the conveyance.[a] Where a bond to secure the faithful performance of a clerk's duties was converted by the obligor tearing off the seal, the measure of damages was held to be the penalty of the bond.[b]

§ 261. **Documents.**—The value of a receipted account in the absence of special circumstances is nominal only.[c] The value of abstracts of title and searches is the cost of procuring other similar searches.[d] The value of a solicitor's docket and papers, containing evidences of bills of costs against certain parties, is the value of the documents *to the owner*;[e] and the same is true of a set of vouchers, accompanied by an affidavit of their correctness.[f]

§ 262. **Title-deeds.**—The rule of damages in trover for title-deeds has not been much discussed in the reports. Regarding the value of the deed as the consideration expressed in it, or the value of the land conveyed by it, there can be little doubt that, in this country, the ordinary rule of damages in trover would not apply, both because the judgment would not, as in actions for the conversion of goods, effect a transfer of the title to the defendant, and because the title of the plaintiff, if re-

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[a] Rogers *v.* Crombie, 4 Me. 274.
[b] Bank of Upper Canada *v.* Widmer, 2 Up. Can. Q. B. (O. S.) 222.
[c] Moody *v.* Drown, 58 N. H. 45.
[d] Watson *v.* Cowdrey, 23 Hun 169.
[e] Doyle *v.* Eccles, 17 Up. Can. C. P. 644.
[f] Drake *v.* Auerbach, 37 Minn. 505.

corded, as is generally the case, would be unaffected by the conversion, and if not recorded, the deed would still be unavailable to the defendant, and the plaintiff can usually have redress in equity. Dixon, C. J., in delivering the opinion of the Supreme Court of Wisconsin, said : ([a])

"No case can be found, I think, where the recovery and satisfaction of a judgment, in an action for the conversion of them (title-deeds), have been adjudged to pass the legal title. I should think that in those cases where the title is unaffected, and the conduct of the defendant has not been fraudulent or oppressive, but where the deed or other written instrument was lost or destroyed through his mistake, negligence, or slight omission, the more just rule of damages would be such sum as would recompense the plaintiff for any actual loss he may have sustained, and for his trouble and expenses in going into a court of equity, or elsewhere, to establish and perpetuate the evidence of his title, with the costs of the action." ([b])

In England the case is different, since, owing to the absence of a registry system, the title-deeds are the only evidence of title. The whole value of the land is therefore allowed to be recovered, but satisfaction of the judgment is entered on the roll, on the defendant delivering up the deeds and paying costs, as between attorney and client, and otherwise placing the plaintiff in as good a situation as before the cause of action arose.([c])

§ 263. **Life.**—It was a rule of the common law that no action would lie for the death of a human being. But

([a]) Mowry *v.* Wood, 12 Wis. 413, 421. In Towle *v.* Lovet, 6 Mass. 394, trover was brought for title-deeds, but the *quantum* of damages was settled by consent.

([b]) *Acc.* Edwards *v.* Dickinson, 102 N. C. 519. In an action of replevin for half-breed land scrip, the owner was allowed to recover the value of the land *to him*, though the patent could be issued only to him. Bradley *v.* Gammelle, 7 Minn. 331. This seems opposed to the cases upon title-deeds.

([c]) Coombe *v.* Sansom, 1 D. & R. 201 ; Loosemore *v.* Radford, 9 M. & W. 657 (*semble*).

since the modern statutes extending a remedy for the wrongful taking of human life, no greater difficulty has been found in estimating the value of a life than in determining many other questions of a like nature which are constantly presented to juries. The rules for estimating the value of a life, however, concern so exclusively the actions which are brought upon the statutes just referred to that they will be discussed in connection with those actions.[a]

§ 264. **Money.**—The value of money, and of the use of it, come frequently before the courts for determination. The rules governing the value of money are, however, of such a peculiar nature as to require separate treatment. The subject will be discussed in the chapters immediately following.

§ 265. **Illegal and noxious property.**—* The character of the property may be such that the law will not give it any protection at all, or at best a partial one. In an action for trespass for cutting and destroying a picture, it appeared that it was a valuable painting, but it also appeared that it was a gross libel on the defendant's sister; and Lord Ellenborough told the jury that they must only award the value of the canvas and paint which formed its component parts.[1] ** So in an action for the conversion of irreligious and illegal pamphlets, it was held that the value *as pamphlets* could not be recovered; the plaintiff was restricted to the value of the materials.[b] So, where trespass was brought against officers of the customs for taking a portfolio and drawings, it has been held by the King's Bench, that the defendant may justify

[1] Du Bost *v.* Beresford, 2 Camp. 511. See, also, Davis *v.* Nest, 6 Car. & P. 167.

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[a] Chapter xviii.

[b] Boucher *v.* Shewan, 14 Up. Can. C. P. 419.

by showing that the portfolio contained drawings liable to seizure for non-payment of duty, which the plaintiff was in the act of carrying ashore out of a foreign packet. The jury found one farthing damages. On this the plaintiffs were nonsuited, and the court refused liberty to enter a verdict for the amount found.[1] So in Iowa, in an action of trespass for breaking into the plaintiff's close and taking certain liquors, which had been adjudged to be forfeited in a judicial proceeding, to which the plaintiff was a party, it was held, that he could not recover the value of the liquors, and, if the defendants acted in good faith, he could recover nominal damages only.([a]) In Pennsylvania, in an action for pulling down a building, evidence that the building was peaceably taken down, and its materials preserved, in conformity with the directions of the commissioners of the township, during a period of great public excitement and disorder, with a view of saving the neighborhood from threatened violence, is admissible in mitigation of damages. But, in such action, evidence that the commissioners had by law the power to abate and remove nuisances, and that a grand jury, after instructions by a competent court, presented the building as a public nuisance, and recommended its abatement, is not admissible in mitigation of damages.[2]

In order, however, to be considered upon the question of value the illegality must be connected with the owner of the property. Ganson *v.* Tifft ([b]) was an action for breach of covenant by a lessor to rebuild. The plaintiff's testator had leased premises of the defendant, and sublet them at an increased rent. The buildings, consisting of

[1] De Goudouin *v.* Lewis, 10 A. & E. 117.

[2] Reed *v.* Bias, 8 W. & S. 189.

([a]) Plummer *v.* Harbut, 5 Ia. 308.

([b]) 71 N. Y. 48.

an elevator and warehouse, were burnt down, and the sublessees terminated their lease under the statute. It was held that, in determining the amount of damages, the rent reserved in the sublease should be taken into consideration. It appeared that there was an association of elevator owners, formed mainly for the purpose of regulating prices, to which, at times, the elevators were all leased. It was held that the future profits or continued value of the lease which might arise from this cause, could not be excluded from the consideration of the jury, either on the ground of remoteness or speculativeness, or because such associations are *illegal.* On the question of illegality, the court says:

"A party who has a contract for the sale of an article of property at the market value, cannot be prevented from recovering the actual value, because the price has been raised by a combination and conspiracy of strangers, to which he is not a party. He is entitled to the real value, without regard to any such consideration; and the alleged conspiracy or combination is too remote to affect such right, so long as he has no association or connection with the conspirators. It is no defense to an action brought to recover the price of property sold, that the vendor knew it was bought for an illegal purpose, provided that it is not made a part of the contract that it shall be used for that purpose, and that the vendor has done nothing in aid or furtherance of the unlawful design.[a] Within this rule, the plaintiff was not guilty of an act which prevented a recovery of the value of the lease; and the real question was, what was the unexpired term worth, under all the circumstances, and for what amount could the premises be sublet?"

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[a] Tracy *v.* Talmage, 14 N. Y. 162, 176.

CHAPTER IX.

MEDIUM OF PAYMENT.

§ 266. Primitive substitutes for money
267. Medium in which a payment may be made.
268. Adoption of a new standard of value.
269. Adoption of a new legal tender —Double standard.
270. Contract payable in gold.
271. Form of judgment on a contract payable in gold.
272. Actions of tort for the loss of gold.
273. Contract payable in foreign currency.
§ 274. Contract payable in a foreign country in currency of that country.
275. Exchange.
276. Contract payable in mercantile securities.
277. Alternative medium.
278. Confederate money—Time of estimating value.
279. Agreements to pay in a medium other than money.
280. Cases allowing recovery of the stipulated amount in money.
281. Cases allowing recovery of the value of the commodity.

§ 266. Primitive substitutes for money.—The ordinary medium of payment is, and in modern times has almost universally been, money. In primitive societies, before the introduction of money, one of the commonest measures of value appears to have been cattle. In Greece, as appears from the Homeric poems,(a) oxen were the measure of value. So in the early ages of Rome, certain fines were payable in sheep and oxen; but in the fourth century of the city money was substituted.(b) The same was true in the early Celtic and Saxon times,(c) and even as late as the seventeenth century, the colonies in this country were forced by the scarcity of specie to

(a) Iliad, bk. 23, vs. 1815.

(b) Aul. Gell. xi. 1; see also Cic. *de Rep.* II. 36; 1 Niebuhr, Hist. of Rome, p. 223.

(c) See § 10.

adopt other standards of value. So in Massachusetts, on Dec. 18, 1631, it was ordered "that corne shall pass for payment of all debts at the usuall rate it is solde for except money or beaver be expressly named."([a]) And on March 4, 1634, "ordered that muskett bullets of a full bore shall pass currently for a farthing apeece provided that noe man be compelled to take above xiid at a tyme in them."([b]) In Virginia while a colony, tobacco was at one time a measure of value. "Virginia was then not only throughout a slave-holding, but a tobacco-planting Commonwealth. You can't open the Statute Book—I mean one of the old Statute Books—not those that have been defaced by the finger of Reform—and not see that tobacco was in fact the currency as well as the staple of the State. We paid our Clerks' fees in tobacco; verdicts were given in tobacco and bonds were executed payable in tobacco."([c])

At the present day, payment is to be made in money unless some other medium is stipulated in the contract. That this is still sometimes the case will be seen in this chapter. But all verdicts must now be given in money, all damages are pecuniary, and a study of the medium of payment becomes practically a study of the value of money.

§ 267. **Medium in which a payment may be made.**—In case of a contract to pay a specified sum of money there is usually no difficulty in estimating the amount to be paid. The monetary system of a country may, however, between the time of contract and the date of payment, be disturbed and altered in one of two ways: the cur-

([a]) 1 Col. Rec. 92.

([b]) 1 Col. Rec. 137.

([c]) Mr. Randolph in the Virginia Convention, Nov. 14, 1829. Proceedings of the Virginia State Convention, p. 375.

rency may become depreciated, or a new standard may be adopted. In such cases the contract will be discharged by a due payment in any coin which by law is made of equivalent value at the time of payment.[1]

§ 268. **Adoption of a new standard of value.**—Where an entirely new standard of value is adopted by the government, the amount to be paid is found by giving such a sum in the new currency as shall be declared by law equal in value to the amount due in the old currency. A notable instance occurred in the change in this country to the decimal system of coinage, when an arbitrary ratio between the old and the new standards was adopted in each State.

A new standard may be adopted more indirectly by the issue of a paper currency, nominally but seldom actually equal to the gold standard. If the government does only this, without making the new money legal tender for the payment of existing debts, it would seem that the creditor should be able to enforce payment on the earlier standard; for it is really a case of adoption of a new standard of value.

Where rent was reserved in "current money of Virginia," and the legislature of Virginia debased the currency in the way just described, it was held that the value of the rent reserved at the time of the lease should be found in gold or other stable medium, and judgment be given for that amount.([a])

[1] Story on Notes, § 390, where the opinion of the continental jurists will be found. Case of Mixed Moneys, Sir John Davies' Reports, 18, s. c. 2 Bligh 98; Pilkington *v.* Commissioner for Claims on France, 2 Knapp 7, 18; Cockerell *v.* Barber, 16 Ves. 461, 465: Story on Con. of Laws, § 312; on Bills, § 163; Searight *v.* Calbraith, 4 Dall. 325; Thompson *v.* Riggs, 5 Wall. 663; Bartsh *v.* Atwater, 1 Conn. 409; Warder *v.* Arell, 2 Wash. Va. 282; Taliaferro *v.* Minor, 1 Call. 524.

([a]) Faw *v.* Marsteller, 2 Cranch 10.

§ 269. **Adoption of a new legal tender—Double standard.**—The most important question, however, because the case is the commonest, arises when the government not only issues a new sort of money, but makes it a legal tender for the payment of debts. This question was presented during the civil war by the passage of the Legal Tender Acts.

Congress, early in the war, passed a law declaring certain Treasury notes, to be issued by virtue of the law, a legal tender in payment of debts,(a) the principle of which was again repeatedly acted on by Congress.(b) Until this legislation, gold and silver coin had been the only legal tender known to the law, and had been not only understood by the profession and the public, but also assumed by high authority to be the only one sanctioned by the Constitution of the United States.(c) Indeed, subject to the constitutional restriction against impairing the obligation of contracts, the rights under them and the remedies upon them had been always regarded as matters exclusively for State regulation and control. But the exigencies of the civil war led to the expedient of giving to the notes of the government the same legal efficacy with gold and silver coin in the discharge of debts; and after a sharp and general controversy in the State courts, which, with rare exceptions, upheld the constitutionality of these laws, they were at last sustained by the highest tribunal in the land.(d) These decisions, however, so far as they applied to contracts made before the passage of the acts, overruled one made shortly be-

(a) Act of February 25, 1862, ch. 33; 12 U. S. Stat. at Large, 345.

(b) 12 Stat. at Large, 709 (Act of March 3, 1863); 13 Stat. at Large, 218 (Act of June 30, 1864).

(c) See Gwin *v.* Breedlove, 2 How. 29.

(d) Knox *v.* Lee, Parker *v.* Davis (Legal Tender Cases), 12 Wall. 457; Dooley *v.* Smith, 13 Wall. 604.

fore by the same court, in which, by a majority of five to three, the law had been declared unconstitutional as to such contracts.[a] They were brought about, moreover, not by an alteration in the opinions of the original majority, but by a change in the members of the court. One of the justices (Mr. Justice Grier), who had concurred with the majority, having resigned, and the number of judges in the court having, by an act of Congress, which took effect on the first Monday of December, 1869, been increased from eight to nine, the two vacancies thus created were supplied by judges who united with the previous minority of the court in overruling, by a vote of five to four, the principle of the former decision. Nevertheless, the later decision was again affirmed, and the constitutionality of the act finally settled, by the case of Juilliard *v.* Greenman.[b]

The result of making paper money a legal tender was to establish two standards of money. Money of either sort was held to pay a debt, and money of neither sort to overpay. In the ordinary case the debtor being anxious to pay the debt as cheaply as possible tendered the less valuable sort of money. Cases arose, however, where the more valuable was tendered.

In Hancock *v.* Franklin Ins. Co.[c] a pledgee held a gold bond as security for a debt not specifically payable in gold. Having collected the bond, he applied a certain proportion to his debt, as though the debt were payable in gold (gold was at 174,—*i. e.*, 74 per cent. premium). He was required to account to the debtor, in an action for money had and received, only for the surplus after paying the debt in gold, the court saying that gold was still legal tender, and did not overpay a debt though

[a] Hepburn *v.* Griswold, 8 Wall. 603. [b] 110 U. S. 421.
[c] 114 Mass. 155.

worth more than paper currency. So where an accounting party collected debts in gold it was held that he might set it off by credits, though they were not payable in gold.([a])

In the converse case, if a creditor having the right to demand payment in gold chose to demand payment out of a fund of paper money, it was held that he must take it dollar for dollar.([b]) The effect of the legal tender act then was to create another legal standard of payment, and in the ordinary case the debtor had the option of paying the debt in the less valuable medium.

Thus where a general deposit was made in a bank, it was held that the bank might pay it in paper, though the paper was less valuable than the medium in which the deposit was made;([c]) and so, though the legal tender became more valuable in comparison with the money deposited.([d]) So where gold was brought into court and was deposited by the prothonotary in a bank before the legal tender act, it was held that on an order for the payment of the money to the claimant after the act when gold was at a premium payment might be made in paper.([e])

Paper was held good payment for a judgment rendered in 1858,([f]) for a debt created by a loan of gold,([g]) or for any other debt contracted while gold was the only standard of value.([h]) So where a seaman had shipped

([a]) Stanwood *v.* Flagg, 98 Mass. 124.

([b]) Stark *v.* Coffin, 105 Mass. 328.

([c]) Thompson *v.* Riggs, 5 Wall. 663.

([d]) Marine Bank *v.* Fulton Bank, 2 Wall. 252.

([e]) Aurentz *v.* Porter, 56 Pa. 115.

([f]) Bowen *v.* Clark, 46 Ind. 405.

([g]) McInhill *v.* Odell, 62 Ill. 169, overruling Morrow *v.* Rainey, 58 Ill. 357.

([h]) Legal Tender Cases, 12 Wall. 457, overruling Hepburn *v.* Griswold, 8 Wall. 603; Belloc *v.* Davis, 38 Cal. 242; Longworth *v.* Mitchell, 26 Oh. St. 334.

at St. John, New Brunswick, on board an American ship for a voyage to London and back, he was held entitled to recover in the United States double the stipulated wages, gold having been at a premium of one hundred per cent. But on appeal the judgment was modified by the Circuit Court of the United States for the first circuit, which held that the libellant could recover no more than the amount in dollars and cents specified in the contract.[a]

§ 270. **Contract payable in gold.**—There is nothing in the letter or the spirit of the legal tender acts to prevent a special contract for payment of *gold* money; and a contract for the payment of coin must therefore be paid in coin. The earlier cases did not recognize this rule. They held that the spirit of the Legal Tender Act required all debts to be payable in legal tender paper, and that this could not be waived by parties to a contract; and therefore that every debt, though expressly payable in coin, could be discharged by tender of paper.[b] But these cases were overruled by the Supreme Court of the United States. By the terms of a mortgage, executed in 1851, the mortgagor agreed "to pay the sum of one thousand five hundred dollars in gold or silver coin, lawful money of the United States." The obligation had been held by the Court of Appeals of New York to be satisfied by the tender of the amount due in legal tender notes, at their nominal value;[c] but this judgment was reversed by the Supreme Court of the United States[d]

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[a] Trecartin *v.* The Rochambeau, 2 Cliff. 465.

[b] Munter *v.* Rogers, 50 Ala. 283; Humphrey *v.* Clement, 44 Ill. 299; Brown *v.* Welch, 26 Ind. 116; Troutman *v.* Gowing, 16 Ia. 415; Galliano *v.* Pierre, 18 La. Ann. 10; Wright *v.* Jacobs, 61 Mo. 19; Murray *v.* Gale, 52 Barb. 427; Shollenberger *v.* Brinton, 52 Pa. 9; Gist *v.* Alexander, 15 Rich. 50.

[c] Rodes *v.* Bronson, 34 N. Y. 649.

[d] Bronson *v.* Rodes, 7 Wall. 229.

in a decision based on two grounds: *first*, that by the various acts of Congress regulating the currency, a contract, payable in gold and silver coin, lawful money of the United States, was equivalent to one to deliver an equal weight of bullion of the same fineness as required by law for the coin; *second*, that as there were two kinds of money at the time the tender was made, both of which were by law a legal tender, but which were, in actual value, far from equivalent to each other, a contract stipulating for payment in the most valuable kind, namely, gold and silver, could only be satisfied by such a payment.([a]) The same principle was subsequently applied by the same court to the case of a breach of covenant for the payment of rent, contained in a lease of certain premises, in the city of Baltimore. The lease was for ninety-nine years, renewable forever, upon an "annual rent of fifteen pounds current money of Maryland, payable in English golden guineas, weighing five pennyweights and six grains, at thirty-five shillings each, and other gold and silver, at their present weights and rates established by act of Assembly."([b]) In the opinion of the majority of the court, delivered by Chase, C. J., in this case, the rule as to the assessment of damages for the breach of such agreements is thus declared: "When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly. It follows that, in the case before us, the judgment was erroneously entered. The damages should have been assessed at the sum agreed to be due,

([a]) Trebilcock *v.* Wilson, 12 Wall. 687; McGoon *v.* Shirk, 54 Ill. 408; Poindexter *v.* King, 21 La. Ann. 697; Governor, Opinion of Court in Response to, 49 Mo. 216; Cooke *v.* Davis, 53 N. Y. 318; Smith *v.* McKinney, 22 Oh. St. 200; Turpin *v.* Sledd, 23 Gratt. 238.

([b]) Butler *v.* Horwitz, 7 Wall. 258.

with interest, in gold and silver coin, and judgment should have been entered in coin for that amount."

Again, when a yearly rent of a specified number of ounces, pennyweights, and grains of pure gold, in coined money, was reserved in a lease, it was held, by the same court, that judgment for the breach of the covenant should be "entered for coined dollars and parts of dollars instead of treasury notes, equivalent in market value to the value in coined money of the stipulated weight of pure gold." [a] So it was held that the legal tender acts did not prevent a State from collecting its taxes in gold and silver coin.[b]

In California and Nevada, accordingly, a law, known as the Specific Money Act, requiring judgments to be paid in the coin or currency stipulated in the contract, was held to be valid, and not in conflict with the legal tender acts.[c] Where, however, there was no contract to pay in coin, but the defendants had wrongfully sold to a third party, real estate which, although not held by them as the court considered in a fiduciary capacity, yet equitably belonged to the plaintiff, and which was valued at $5,200 gold, it was held by the Supreme Court of California that the specific money act did not apply.[d]

§ 271. **Form of judgment on a contract payable in gold.**— A difficulty arose when the courts attempted to enforce payment in gold. A judgment for the value of the gold in currency was objectionable in two respects. In prac-

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[a] Dewing *v.* Sears, 11 Wall. 379.

[b] Lane County *v.* Oregon, 7 Wall. 71.

[c] Carpentier *v.* Atherton, 25 Cal. 564; Harding *v.* Cowing, 28 Cal. 212; Spencer *v.* Prindle, 28 Cal. 276; McComb *v.* Reed, 28 Cal. 281; Reese *v.* Stearns, 29 Cal. 273; Tarpy *v.* Shepherd, 30 Cal. 180; Poett *v.* Stearns, 31 Cal. 78; Linn *v.* Minor, 4 Nev. 462; Clark *v.* Nevada L. & M. Co., 6 Nev. 203, overruling Milliken *v.* Sloat, 1 Nev. 573.

[d] Price *v.* Reeves, 38 Cal. 457.

tice it did not do justice, for the value of paper fluctuated to such an extent that a judgment which represented the true value of the gold at one time would not represent it at another; in principle such a judgment would be equally objectionable, since it allowed the courts themselves to make a distinction between two sorts of currency declared to be equal by statute.(a) This principle was neglected in a few States; gold was treated like any merchandise, and damages assessed for failure to have it at the time appointed. The value of the gold at the time of performance of the contract was assessed in paper, and judgment was given for that amount.(b) The difficulty was met elsewhere in another way. Judgment was given for the amount due, in gold, a new writ being framed for the purpose, and this judgment could be satisfied only by payment in gold.(c)

This form of writ was used in California for the purpose of wholly frustrating the intent of the law. In that State, owing to the universal opposition of the community and its determination not to abandon a gold standard, the Legal Tender Act was never enforced; and notwithstanding its provisions, and the decisions of the courts elsewhere, the State courts allowed damages in

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(a) Kellogg *v.* Sweeney, 46 N. Y. 291.

(b) Baker's Appeal, 59 Pa. 313; Frank *v.* Colhoun, 59 Pa. 381; *acc.* Dunn *v.* Barnes, 73 N. C. 273; Wills *v.* Allison, 4 Heisk. 385; Bond *v.* Greenwald, 4 Heisk. 453.

(c) The Emily Souder, 17 Wall. 666; Chisholm *v.* Arrington, 43 Ala. 610; Bowen *v.* Darby, 14 Fla. 202; Stringer *v.* Coombs, 62 Me. 160; Chesapeake Bank *v.* Swain, 29 Md. 483; Independent Ins. Co. *v.* Thomas, 104 Mass. 192; Warren *v.* Franklin Ins. Co., 104 Mass. 518; Stark *v.* Coffin, 105 Mass. 328; Currier *v.* Davis, 111 Mass. 480; Whitney *v.* Thacher, 117 Mass. 523; Chrysler *v.* Renois, 43 N. Y. 209; Phillips *v.* Speyers, 49 N. Y. 653; Stephens *v.* Howe, 34 N. Y. Super. Ct. 133; Quinn *v.* Lloyd, 1 Sweeney 253; Phillips *v.* Dugan, 21 Oh. St. 466; Bridges *v.* Reynolds, 40 Tex. 204; Johnson *v.* Stallcup, 41 Tex. 529.

ordinary actions to be computed in gold, and judgment to issue for gold. The Federal courts, though not upholding the practice, refused to reverse such judgments merely on that ground.([a])

§ 272. **Actions of tort for the loss of gold.**—Analogous to actions upon contracts payable in gold were actions of tort for the loss of gold. In an action against common carriers for the value of ninety double eagles of U. S. coinage, intrusted to them as common carriers, to carry from Acapulco to Newburyport, the measure of damages was the value in legal tender notes of the coin as a commodity, at the time when and place where it should have been delivered, with interest on the amount from the date of the demand.([b]) But in an action against a hotel-keeper for the loss of a bag of gold coin, it was held by the Court of Appeals of New York, modifying the judgment below,([c]) that the judgment should be entered in *coin*, and not in its equivalent in currency.([d])

§ 273. **Contract payable in foreign currency.**—Where a contract is expressly payable in the currency of a foreign country, since judgment must be given in the currency of the forum, the court does not estimate the damages in the foreign currency; but that currency is treated like

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([a]) Edmondson *v.* Hyde, 2 Sawy. 205.

([b]) Cushing *v.* Wells, 98 Mass. 550.

([c]) 1 Lans. 397.

([d]) Kellogg *v.* Sweeney, 46 N. Y. 291. It may be remarked that in this case, Peckham, J., delivering the opinion of the court, observes that he sees no reason for calling the gold coin "merchandise." It is, however, held by the Supreme Court of the United States, that gold coin, during the rebellion, was "an article of merchandise," within the meaning of the acts of July 13, 1861, and May 20, 1862 (12 Stat. at Large, 255 404), prohibiting the taking of "goods, wares, and merchandise to an insurrectionary district," Gay's Gold, 13 Wall. 358.

any other commodity and judgment is given for its value at the time of performance.([a])

In one or two cases it has been said that the value of the foreign currency should be estimated at the date of trial, not at the date of performance.([b]) So in an action on a note made by the defendant in Canada, payable in Canadian currency, which at and continually subsequent to the date of the note was at a premium over the United States currency, it was held by the Supreme Court of Wisconsin that the premium might be recovered, and should be calculated at the rate current at the date of the judgment, which should be for a sum that would purchase Canadian funds to the amount found due on the note. Any payment previously made on the note should be credited at the rate of premium current at the time of such payment.([c]) But this theory overlooks the fact that the foreign currency is only a commodity. The contract is to deliver this commodity; if after breach the defendant had tendered the debt and interest in foreign currency, it would not have been a good tender. The plaintiff's claim has become one for damages for breach of contract, and the damages, of course, are estimated in the money of the forum.

That the foreign currency is only a commodity is strikingly shown by a case in Nova Scotia, where the Supreme Court of that Province held that United States treasury notes were not a legal tender for rent there payable in dollars and cents of United States currency.([d]) If the payment were to be in *money* of the United States

([a]) Pollock *v.* Colglazure, Sneed (Ky.) 2; Sheehan *v.* Dalrymple, 19 Mich. 239; Fabbri *v.* Kalbfleisch, 52 N. Y. 28; Colton *v.* Dunham, 2 Paige 267; Mather *v.* Kinike, 51 Pa. 425; Christ Church Hospital *v.* Fuechsel, 54 Pa. 71.

([b]) Robinson *v.* Hall, 28 How. Pr. 342.

([c]) Hawes *v.* Woolcock, 26 Wis. 629.

([d]) Nova Scotia T. Co. *v.* American T. Co., 4 Am. Law Reg. (N. S.) 365.

the Legal Tender Act would apply and the tender be a good one.

§ 274. Contract payable in a foreign country in currency of that country.—Where suit is brought in one country upon a contract payable in a foreign country, the plaintiff must of course recover damages in the currency of the *forum litis*; and he should recover such amount as will compensate him for his failure to get the foreign money at the time and place of payment. This, generally speaking, is the value of the foreign money in domestic money, estimated at time of payment.[a]

A difficulty arose in connection with the Legal Tender Act. It was urged on the one hand that as the legal tender currency was without intrinsic value, no equivalent in that currency to foreign coin could be furnished. The value of the foreign debt, therefore, could not be directly estimated in paper currency, but must necessarily be estimated in gold or silver dollars or units of value. After being thus ascertained in dollars, the acts of Congress which make all debts payable in certain paper currency would become applicable. And the foreign creditor having an ascertained claim of a certain number of dollars, would necessarily be compelled, like any other creditor, to accept payment of the amount in notes which are made by law a legal tender for all debts. This reasoning was adopted by the courts of Massachusetts and New York, which accordingly gave judgment for so many dollars as in gold would be equal to the amount of foreign money due, and refused to add the premium of gold.[b]

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[a] Marburg *v.* Marburg, 26 Md. 8; Burgess *v.* Alliance Ins. Co., 10 All. 221; Nickerson *v.* Soesman, 98 Mass. 364; Comstock *v.* Smith, 20 Mich. 338; Benners *v.* Clemens, 58 Pa. 24; Campbell *v.* Wilson, Berton (N. B.) 265.

[b] Bush *v.* Baldrey, 11 All. 367; Cary *v.* Courtenay, 103 Mass. 316; Swanson *v.* Cooke, 45 Barb. 574; Rice *v.* Ontario Steamboat Co., 56 Barb. 384.

This view, however, does not conform to the principle of compensation. There never was a contract to pay the number of dollars allowed by the judgment. The suit is brought on a claim for damages which accrued at the breach of the contract, and which was equal to the amount which the plaintiff would have obtained at the time and place of performance. The Legal Tender Act has no application to the measure of damages. As in an action for the conversion of property, the judgment must be for the value of the property which the plaintiff should have had, measured in the common money standard. The cases first cited are therefore correct in principle, and the Massachusetts and New York decisions are erroneous.

So where suit was brought in Canada to recover a debt due in the United States before the Legal Tender Act, the plaintiff should recover such amount of Canada money as would be equivalent to the amount of the debt in gold, that is, to its amount at the time and place of payment,[a] but in a suit on such a debt payable after the Legal Tender Acts the plaintiff should recover an amount equal only to the value of the specified amount of paper money at the time of payment.[b]

It has been held that where a contract is payable in foreign gold, the judgment should be for the proper amount of gold, as in the case of a contract to pay gold in the United States;[c] but the weight of authority is the other way,[d] and it seems rightly. The common

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[a] Massachusetts Hospital *v.* Prov. L. Ins. Co., 25 U. C. Q. B. 613; Judson *v.* Griffin, 13 U. C. C. P. 350; White *v.* Baker, 15 U. C. C. P. 292.

[b] Hooker *v.* Leslie, 27 U. C. Q. B. 295; Crawford *v.* Beard, 14 U. C. C. P. 87.

[c] Stringer *v.* Coombs, 62 Me. 160.

[d] Marburg *v.* Marburg, 26 Md. 8; Ladd *v.* Arkell, 40 N. Y. Super. Ct. 150; Benners *v.* Clemens, 58 Pa. 24.

standard is paper money, and damages are estimated in that standard unless there is something to prevent it. The express agreement of the parties must be respected, and consequently in contracts to pay gold dollars judgment is given for the gold. In the case under consideration, however, there is no contract for gold dollars, and no more reason for a judgment in gold than there would be in an action for the conversion of a gold cup.

§ 275. **Exchange.**—The value of foreign money is often arbitrarily regulated by statute.(a) If there is such a

(a) The former rule as to damages on a bill of exchange drawn in this country and payable in England in pounds sterling, was to estimate the pound at $4.44 (which was originally the valuation for revenue purposes, Act March 2, 1799, ch. 22, § 61, 1 Stat. at Large, 673), adding what was known as the "rate of exchange" between this country and England at the time of the trial, with interest. By an act of Congress, however, passed July 14, 1832, (4 Stat. at Large, 583), the value of the pound sterling, in calculating the rates of duties, was fixed at $4.80, and subsequently, for the purpose of payments into the United States treasury, and the appraisement of imported merchandise, it was made equal to $4.84 (Act July 7, 1842, 5 Stat. at Large, 496). And by the second section of a statute, entitled "An act to establish the custom house value of the sovereign or pound sterling of Great Britain, and to fix the par of exchange," approved March 3, 1873 (17 Stat. at Large, 602), it is provided as follows: That in all payments by or to the treasury, whether made here or in foreign countries, where it becomes necessary to compute the value of the sovereign or pound sterling, it shall be deemed equal to four dollars eighty-six cents and six and one-half mills, and the same rule shall be applied in appraising merchandise imported, where the value is, by the invoice, in sovereigns or pounds sterling, and in the construction of contracts payable in sovereigns or pounds sterling; and this valuation shall be the par of exchange between Great Britain and the United States; and all contracts made after the first day of January, eighteen hundred and seventy-four, based on an assumed par of exchange with Great Britain of fifty-four pence to the dollar, or four dollars forty-four and four-ninths cents to the sovereign or pound sterling, shall be null and void. At the time of the passage of this act (which, it will be observed, is much broader in its scope than its predecessors), the English sovereign, owing to the changes in the value of the precious metals, had come to be worth a little over $4.86 in gold coin. To correct the error caused in our accounts with Great Britain, by the difference between the actual value and the legal value of $4.44, about nine and a half per cent., under the name of "exchange," was added to the legal value. By the act in question, this element of confusion is eliminated.

statute, however, it gives the value of the foreign money not in the foreign country, but in the domestic forum. And proof of the actual value of the foreign money, based on comparative weight of the standards of value, also gives the value of the foreign currency in the domestic forum. But recovery should be had for the value of the foreign currency at the place of payment. This value is obtained by adding to or subtracting from the real or statutory value, as the case may be, the rate of exchange. On this question authorities differ. The better opinion is that the rate of exchange should be included in the recovery.([a]) In New York and Massachusetts, however, it has been distinctly held that the debt is to be paid according to the par and not the rate of exchange, and that the creditor is not entitled to any allowance on account of the difference of exchange between the country where the suit is brought and the country where the debt was payable;([b]) and that in an action here on a contract to pay money in another country (not a bill of exchange), no exchange can be recovered, although there were no tribunals in that country in which the plaintiff could sue.([c])

§ 276. **Contract payable in mercantile securities.**—Where payment is to be made in notes which are not money, the notes are mere commodities; the contract becomes

([a]) Story, Confl. Laws, §§ 308, 312; Story, Notes, § 396; 3 Kent Com. 116 n.; Ekins *v.* East India Co., 1 P. Wms. 395; Cash *v.* Kennion, 11 Ves. 314; Scott *v.* Bevan, 2 B. & A. 78; Delegal *v.* Naylor, 7 Bing. 460; Lanusse *v.* Barker, 3 Wheat. 101, 147; Woodhull *v.* Wagner, 1 Bald. 296, 302; Grant *v.* Healey, 3 Sumner 523; Smith *v.* Shaw, 2 Wash. C. C. 167, 168; Cropper *v.* Nelson, 3 Wash. C. C. 125; Jelison *v.* Lee, 3 W. & M. 368; Hargrave *v.* Creighton, 1 Woods 489; Lee *v.* Wilcocks, 5 S. & R. 48.

([b]) Adams *v.* Cordis, 8 Pick. 260; Cary *v.* Courtenay, 103 Mass. 316; Martin *v.* Franklin, 4 Johns. 124; Scofield *v.* Day, 20 Johns. 102; Guiteman *v.* Davis, 45 Barb. 576 n.; Ladd *v.* Arkell, 40 N. Y. Super. Ct. 150.

([c]) Lodge *v.* Spooner, 8 Gray 166; Hussey *v.* Farlow, 9 All. 263.

one for the delivery of chattels, and upon breach of it the measure of damages is the value of the notes at the time of the breach. So where a contract was payable in "solvent notes and accounts of other men," the measure of damages was not the amount to be paid, but the value in money of that amount of "solvent notes of other men."([a]) Where a note was payable in railroad stock, the measure of damages was the market value of the stock at the time of payment.([b]) Under a written contract, by which the defendant undertook to deliver the plaintiff two notes "on" certain named persons, or if he failed to do so, "to make satisfaction" within four weeks, it was held that the measure of damages was the value of the designated notes, and that the burden of proof of their value was on the plaintiff, as an essential ingredient in his case.([c]) So in Kentucky, the measure of damages for breach of an obligation to pay in cash notes is the value of the notes.([d]) In a suit in Indiana, for non-delivery of notes under an agreement to pay $900 in cash notes on "good solvent" men, it was held that the measure of damages was not the sum named, but the value of the notes to be found by a jury.([e]) The rule adopted, we think, was right, and not the less so that what is called "solvency" in Indiana, as it certainly often is elsewhere, would seem, in the judicial apprehension, to have been a thing of uncertain value. So, in the same State, in a suit on a note payable in "good judgments on good men," the value of the judgments is held the measure of damages.([f])

([a]) Williams *v.* Sims, 22 Ala. 512.
([b]) Parks *v.* Marshall, 10 Ind. 20; Jones *v.* Chamberlain, 30 Vt. 196.
([c]) Moore *v.* Fleming, 34 Ala. 491.
([d]) Marr *v.* Prather, 3 Met. (Ky.) 196.
([e]) Williams *v.* Jones, 12 Ind. 561.
([f]) Pierce *v.* Spader, 13 Ind. 458.

If, however, the payment stipulated for is a note or other obligation of the defendant himself, it is to be estimated at par and not at its actual value.(a) Thus in an action brought by a railroad company on a note, the defendant pleaded in set-off an obligation of the plaintiff company to deliver him a certain amount in its bonds. It was held that the set-off should be allowed for the par value of the bonds, though at the time of payment their market value was less.(b) This must be rested on grounds of estoppel.

§ 277. **Alternative medium.**—The rule of the least beneficial alternative which we consider elsewhere, is also found here. Thus in Tennessee,[1] it has been decided that the measure of damages for breach of a covenant to pay a given sum in a particular species of paper, as Tennessee, Alabama, or Mississippi bank notes, is the specie value of such notes, according as it would be for the interest of the covenantor to discharge the obligation ; the court saying :

"Manifestly, on the day the payment was to be made, the covenantor might have discharged himself by the payment of one hundred dollars, in paper of either description mentioned in the covenant ; of course he might have selected the least valuable bank notes mentioned. If he failed to pay, and broke his covenant, what injury did the covenantee sustain thereby? Certainly, only the value in money of the article in which payment might have been made. As the measure of damages in covenant consists in the value to the covenantee of the thing agreed to be performed at the time of the breach, the damages in this case must be the specie value of such notes, in which payment might have been made, and in which it would have been most to the interest of the covenantor to have paid."

[1] Hixon *v.* Hixon, 7 Humph. 33.

(a) Savannah & C. R.R. Co. *v.* Callahan, 56 Ga. 331 ; Dunsworth *v.* Wood M. Co., 29 Ill. App. 23 ; Worthy *v.* Jones, 11 Gray 168 ; Texas W. Ry. Co. *v.* Gentry, 69 Tex. 625.

(b) Memphis & L. R. R.R. Co. *v.* Walker, 2 Head. 467.

§ 278. **Confederate money.**—It seems that the cases involving payment of Confederate money must be rested on the same principle with those involving payment in mercantile securities. That money consists simply of the notes of an illegal but *de facto* corporation; contracts to pay such currency were not invalid,[a] and payments received in such notes by an agent were good, and bound the principal.[b] Confederate notes, then, were recognized for this purpose as the notes of a *de facto* corporation. It would therefore seem on principle that the measure of damages for a failure to pay such notes would be the value of the notes at the time of payment; to be obtained by estimating the value in gold (the common standard), and then reducing the gold to legal tender paper.[c]

There is a seeming hardship in this case, for the notes came finally to be valueless; and plaintiffs might therefore be utterly without remedy. This on reflection will appear to be a risk taken by the plaintiff, who made a contract to receive such notes in the future with full

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[a] Thorington *v.* Smith, 8 Wall. 1; Confederate Note Case, 19 Wall. 548. But see Hanauer *v.* Woodruff, 15 Wall. 439; Leach *v.* Smith, 25 Ark. 246. In Green *v.* Sizer, 40 Miss. 530, the doctrine is adhered to in that State, and applied to the case of a deposit with a banker during the late civil war, of Confederate treasury notes, Mississippi cotton notes, and Mississippi military treasury notes; the validity of which obligations, although issued by authority of the insurgent government, is maintained on the ground that this government existed *de facto* before the notes were issued, and that at the time of the deposit they passed from hand to hand as representatives of value.

[b] Robinson *v.* International L. I. Soc., 52 Barb. 450; Baird *v.* Hall, 67 N. C. 230; Rodgers *v.* Bass, 46 Tex. 505. But *contra*, Mangum *v.* Ball, 43 Miss. 288. A mere promise to pay money, if made in those States during the existence of the Confederacy, would usually be found to have been intended as a promise to pay such currency, but not always. See Confederate Note Case, 19 Wall. 548.

[c] Keppel *v.* Petersburg R.R. Co., Chase's Dec. 167; Powe *v.* Powe, 42 Ala. 113; Bowers *v.* Thomas, 6 Heisk. 553; Moore *v.* Gooch, 6 Heisk. 104.

knowledge that their value depended on the success of the Confederacy. But the apparent hardship of the case has so forcibly appealed to the courts that they have modified what seems to be the true principle. Thus in some cases the value of the consideration was held to be the measure of damages.([a]) The prevailing view, however, which was finally adopted by the Supreme Court of the United States, is that the measure of damages is the value of the currency at the time of entering into the contract.([b])

There was much dispute as to whether the value of the Confederate currency should be estimated by the value of the currency in United States notes, in gold or by its purchasing power. The legislatures of many of the Southern States passed scaling acts, as they are called, by which the currency received an arbitrary valuation, and those acts must be examined. There is a *quære* as to their constitutionality in The Confederate Note Case.([c]) In Thorington *v.* Smith ([d]) the value was taken in lawful money of the United States. In Wilmington & W. R.R. Co. *v.* King ([e]) this question would appear to have been finally settled. The defendants had contracted to pay for wood at a dollar per cord, in Confeder-

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([a]) Whitley *v.* Moseley, 46 Ala. 480; Wharton *v.* Cunningham, 46 Ala. 590; Thompson *v.* Bohannon, 38 Tex. 241; Shearon *v.* Henderson, 38 Tex. 245; Moore *v.* Harnsberger, 26 Gratt. 667.

([b]) Thorington *v.* Smith, 8 Wall. 1; Stewart *v.* Salamon, 94 U. S. 434; Effinger *v.* Kenney, 115 U. S. 566; Kirtland *v.* Molton, 41 Ala. 548; Toulmin *v.* Sager, 42 Ala. 127; Marshall *v.* Marshall, 42 Ala. 149; Herbert *v.* Easton, 43 Ala. 547; Whitfield *v.* Riddle, 52 Ala. 467; Barclay *v.* Russ, 14 Fla. 372; Fleming *v.* Robertson, 3 S. C. 118; Short *v.* Abernathy, 42 Tex. 94; Fultz *v.* Davis, 26 Gratt. 903; Brightwell *v.* Hoover, 7 W. Va. 342; Bierne *v.* Brown, 10 W. Va. 748.

([c]) 19 Wall. 548.

([d]) 8 Wall. 1.

([e]) 91 U. S. 3.

ate currency. It was held that the purchasing power of specie, which that currency had, was the amount to be recovered, and that it was not proper to instruct the jury that the plaintiff could recover the value of the wood without reference to the value of the currency. It was further held that an act of North Carolina, which allowed the jury to look to the consideration of the contract in such cases, was unconstitutional. Bradley, J., dissented, on the ground that specie was not a proper standard, for there was no specie in the country; that the proper standard was the purchasing power of the currency, and that the value of the wood was good evidence of the purchasing power.

A special deposit of Confederate notes could be discharged by the same notes, though they had at the time of demand little or no value;[a] and so in case of refusal to return such a deposit the measure of damages was held to be, not the value of the notes at the time they were given, but the value at the time of the demand.[b]

§ 279. Agreements to pay in a medium other than money.—Agreements are frequently made to pay the amount of a claim in articles other than currency. Payment in this medium may become more profitable to the debtor; sometimes it may become more onerous. Questions arise similar to those already referred to, the debtor desiring to pay in the less valuable medium, the creditor demanding payment in that which is more valuable. Two different rules have been adopted by the various courts. On principle, it would seem that ordinarily the creditor should recover compensation by the failure of the debtor to pay in the specified medium at the time appointed; that is, he should recover the market value

[a] Turner *v.* Beall, 22 La. Ann. 490; Richardson *v.* Futrell, 42 Miss. 525.
[b] Planters' Bank *v.* Union Bank, 16 Wall. 483.

of the articles he would have received, whether that value turn out to be a loss or a gain to him. This is the rule generally followed. On the other hand, it is said that such a contract merely gives the debtor an election to pay in the specified medium, instead of in currency, and if he neglects to avail himself of the option at the time appointed, he must pay the sum of the claim in current money. While this rule may in some cases be consistent with the terms of the so-called note or other contract, it certainly imports into the usual agreement an option which the terms do not justify; and it fails to observe the principle of compensation in not giving to the creditor compensation for the precise loss which he suffered by not receiving the promised articles on the day set for payment.

§ 280. Cases allowing recovery of the stipulated amount in money.—The second rule was at first adopted in New York. In an early case notes were given in this form: "I promise to pay seventy-nine dollars and fifty cents, on the first day of January, in salt, at fourteen shillings per barrel." The Supreme Court held this to be a contract for the delivery of salt, and that the value of the salt was the true measure of damages; thus, 45 barrels and 3–7th of a barrel would have discharged the note, at 14 shillings a barrel; and so, if salt had been only a dollar per barrel, at the time specified for payment or delivery, the same quantity would discharge the note; the value, then, of 45 barrels and 3–7ths of a barrel was the rule of damages. The Court of Errors, however, held the instrument not to be a contract for the delivery of salt at all events, but intended to give the party his election to pay the sum expressed in money, or in salt; and that as the defendant had neglected to avail himself of the privilege of paying the specific article, the payment

of the principal debt and interest must give the true measure of damages; and the judgment of the court was reversed.[1] So in Connecticut, in a suit on a promissory note to pay "two hundred and fifty dollars in brown cotton shirting at the rate of thirty cents a yard," the defendant offered to prove that the shirting at the time and place fixed for payment, was worth only twenty cents a yard. But the evidence was excluded; the court holding that the instrument was an acknowledgment of a debt for the sum named, with an option to pay it in a certain way, which option the defendant had failed to take advantage of; and that consequently the promise was to be regarded as a naked agreement to pay the money.[2]

In Vermont, it has been said, "that in that State, by an uninterrupted series of decisions, notes payable in specific articles of property, after the time of payment has elapsed, seem to stand much in the same condition as notes payable in money, except in their lack of negotiability"; and the plaintiff was held entitled to recover under the money counts.[3] So in Ohio, the measure of damages for the violation of an agreement to pay $1,500 in wool, at 20 cents per pound, is fifteen hundred dollars, and not the market value of the wool.([a]) And the same rule has been adopted in Texas ([b]) and California.([c])

Where one agreed to pay forty dollars (a year's rent) in specific articles, at prices and in quantities specified, it was held, that if the tenant tendered the articles when due, the landlord must receive them, not at their cash value, but the stipulated price; and if he did not tender

[1] Gleason *v.* Pinney, 5 Cow. 152; 5 Wend. 393; Clark *v.* Pinney, 7 Cow. 681.

[2] Brooks *v.* Hubbard, 3 Conn. 58.

[3] Perry *v.* Smith, 22 Vt. 301.

([a]) Trowbridge *v.* Holcomb, 4 Oh. St. 38.

([b]) Short *v.* Abernathy, 42 Tex. 94.

([c]) Cummings *v.* Dudley, 60 Cal. 383.

them, the landlord could not recover them, but must take the forty dollars which was held to be liquidated damages on the tenant's failure to perform.(a)

§ 281. **Cases allowing recovery of the value of the commodity.**—In South Carolina the true rule has been followed from the beginning. Thus, a note "to deliver to the plaintiff or order, such number of barrels of new rice as will amount to the sum of two hundred dollars, value received this day, at one dollar per cwt.," was held to be clearly a contract for the delivery of rice; and the measure of damages was held to be the value of the rice at the time it was to be delivered, which exceeded considerably the value fixed by the note.[1] In New Hampshire, too, the doctrine is maintained in relation to notes payable in specific articles, that after the time of payment has elapsed, the obligation of the maker is not a mere duty to pay money, but a liability in damages for the non-fulfilment of his contract.[2] In Tennessee, on an agreement to pay $125 in potash at $5 per hundred in ninety days, the measure of damages was held to be the value of the potash at the time and place of payment.(b) In Massachusetts, on a contract to pay $1,000 in paper-hangings at the "regular trade price," the measure of damages was held to be the market value, at the time and place of payment, of the amount of paper-hangings of which the regular trade price at that time was $1,000.(c) The same rule is generally followed elsewhere.(d)

[1] Price *v.* Justrobe, Harper 111. [2] Wilson *v.* George, 10 N. H. 445.

(a) Heywood *v.* Heywood, 42 Me. 229.

(b) McDonald *v.* Hodge, 5 Hayw. (Tenn.) 85.

(c) Meserve *v.* Ammidon, 109 Mass. 415.

(d) Rose *v.* Bozeman, 41 Ala. 678; Davenport *v.* Wells, 1 Ia. 598; Cole *v.* Ross, 9 B. Mon. 393; Lyles *v.* Lyles, 6 H. & J. 273; Noonan *v.* Ilsley, 17 Wis. 314.

CHAPTER X.

INTEREST.

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§ 282. **What interest is.**—Interest is the value of the use of money: the amount of compensation for withholding money.([a]) It bears the same relation to money that rent does to land, wages to labor, and hire to a chattel. It may be secured by an agreement, or it may be allowed as damages: in the former case the rate is usually stipulated in the agreement, in the latter it is usually fixed by legislation. It is not necessary, however, that the amount should be fixed by statute: for in the absence of a statute rate, the court will admit proof of the current rate, and will allow interest as damages at that rate.([b])

Where interest is secured by an agreement it is given by the court, not by way of damages, but as a substantive part of the debt; ([c]) the consideration of this branch of the subject, therefore, does not come within the scope of this treatise. But in all cases where damages are claimed for the wrongful detention of money the allowance of interest is governed by the law of compensation, and, therefore, will be treated here: for a full understanding of the rules which govern the allowance of interest as

([a]) Loudon *v.* Taxing District, 104 U. S. 771; Minard *v.* Beans, 64 Pa. 411.

([b]) Davis *v.* Greely, 1 Cal. 422; Perry *v.* Taylor, 1 Utah 63.

([c]) Hummel *v.* Brown, 24 Pa. 310.

damages, however, it will be necessary also to consider some cases where interest is allowed on a contract to pay it. The English courts are less liberal in the allowance of interest than the American; and it would be confusing to consider the English and American cases together. The English law will therefore first be considered.

§ 283. **Origin of the allowance of interest.**—*Interest was originally introduced into English jurisprudence by statutory provision. "Before the statute of Henry VIII.,"[1] says Lord Mansfield,[2] "all interest on money lent was prohibited by the common law, as it is now in Roman Catholic countries."[3] This statute provided that none should take for any loan or commodity above the rate of ten pounds for one hundred pounds for one whole year, which rate was reduced to five per cent. by a subsequent act.[4] **

§ 284. **English law—Rule laid down by Lord Mansfield.**—*Where a principal sum is to be paid at a specific time, the English law was held by Lord Mansfield to imply an agreement to make good the loss arising from a default, by the payment of interest. Thus he expressly said,[5] in an early case:

"Where money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract *to pay the money at the given time, and to pay interest for it from the given day in case of failure of payment at that day.* So that the action is, in effect, brought to obtain a specific performance of this contract. For pecuniary damages upon a contract for the payment of money, are, from the nature of the thing, a specific performance, and the relief is defective so far as all the money is not paid."

[1] 37 Hen. VIII., c. 9.

[2] In Lowe *v.* Waller, Douglass, 736, 740.

[3] This conclusion, notwithstanding a contrary dictum of Lord Hale (Anon. Hard. Rep. 420), is arrived at by Mr. Senator Spencer, in his very able dissenting opinion in the Rens. Glass Factory *v.* Reid, 5 Cowen, 587, 604, hereafter cited.

[4] 12 Anne, stat. 2, c. 16.

[5] Robinson *v.* Bland, 2 Burr. 1077, 1086 (1760).

And Lord Thurlow said,[1] "All contracts to pay undoubtedly give a right to interest from the time when the principal ought to be paid." This language has been cited with approbation in this country,[2] though, as we shall see, it has not been followed in England.**

§ 285. **Time of payment indefinite.**—*On the other hand, where money is due, without any definite time of payment, and there is no contract, express or implied, that interest shall be paid, the English rule, independent of statute, has always been, that it cannot be claimed. In the Common Pleas,[3] it was early said, that in an action for money had and received, the plaintiff could recover nothing but the net sum without interest. In the King's Bench,[4] Lord Ellenborough said: "Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen years, and I have now sat here for more than nine years; and during this long course of time, no case has occurred, where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, interest has ever been given." The interest here claimed was on money lent.[5] **

§ 286. **English law—Fraud.**—*The rule here laid down has been, as we shall see, a good deal modified in this country; but the English courts have adhered to the doctrine with considerable rigor. Thus they have refused interest where property has been unjustly detained, or payment improperly refused, even in cases of fraud;

[1] Boddam *v.* Riley, 2 Bro. C. C. 2.
[2] Williams *v.* Sherman, 7 Wend. 109.
[3] Walker *v.* Constable, 1 B. & P. 307; Tappenden *v.* Randall, 2 B. & P. 467.
[4] Calton *v.* Bragg, 15 East 223.
[5] *Acc.* Arnott *v.* Redfern, 3 Bing. 353; but *contra*, Trelawney *v.* Thomas, 1 H. Bl. 303.

Lord Ellenborough[1] saying, that the fraud did not take this case out of the rule which he had previously laid down,[2] that there must be an agreement, express or implied; and the same principle was afterwards adhered to.[3] **

§ 287. **Mercantile securities.**—Where a note is not paid when due, it was said in the old cases that interest was not recoverable as matter of law, nor as part of the debt, but that the jury could give damages for the non-payment, and could give as damages interest on the amount, but that doing so was in their discretion. The law is settled that, if it is not payable by the terms of the note, it is only recoverable as damages.(a) In Cameron *v.* Smith,(b) Bayley, J., said: "Although by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages which must go to the jury, in order that they may find the amount." He proceeded to say, that the jury could allow what interest they pleased, according to the damage; and that, if the non-payment was due to the default of the holder, they need not allow any.[4] So, in Dent *v.* Dunn(c) it was held that interest stopped from the time an offer to pay was made, for there was no wrong after that, and therefore no damages were recoverable. Lord Ellenborough, referring to interest on promissory notes, said: "It is more frequently recovered in the shape of damages, for money improperly retained by the debtor

[1] Crockford *v.* Winter, 1 Camp. 124, 129.

[2] De Havilland *v.* Bowerbank, 1 Camp. 50.

[3] De Bernales *v.* Fuller, 2 Camp. 426.

[4] So it was refused where a promissory note had been overdue thirty years; and the court on motion, would not increase the verdict by giving it. Du Belloix *v.* Lord Waterpark, 1 Dow. & Ry. 16.

(a) See, for a full discussion, the arguments in *In re* Burgess, 2 Moore 745; 2 Parsons' Notes & Bills, chap. xi, p. 391.

(b) 2 B. & Ald. 305.

(c) 3 Camp. 296.

contrary to the request of the creditor."[1] The jury has, accordingly, been allowed to give much more than the usual rate of interest. So in Keene *v.* Keene (a) the court refused to disturb an assessment of damages where the plaintiff had recovered interest at the rate of ten per cent., the rate of the note, although the usual rate was much less. Willes, J., saying: "Until the maturity of the bill, the interest is a debt; after its maturity, the interest is given as damages, at the discretion of the jury." In *ex parte* Charman, (b) an appeal from the Bankruptcy Court, the nature of interest on overdue paper was considered. Lord Esher, M. R., said that interest could not be claimed on a bill of exchange or a promissory note as part of the contract, unless there was an express agreement to pay interest. Interest could only be given by way of damages. In an action on the bill, the jury could give interest as damages, but they were at liberty to refuse to do so. The interest was no part of the debt. Now that actions could be tried by a judge without a jury, the judge could give or refuse to give interest. If under any circumstances a Court of Equity gave interest on a bill, it must have been given as a species of equitable damages. According to the ordinary meaning of the word "debt," interest, which could only be given by way of damages, was not a "debt."

§ 288. **Contract, express or implied.**—Even where money was payable at a definite time, it was early settled, in

[1] Chitty on Bills, 11th ed., p. 433; De Havilland *v.* Bowerbank, 1 Camp. 50; De Bernales *v.* Fuller, 2 Camp. 426; Walker *v.* Constable, 1 B. & P. 306; Du Belloix *v.* Lord Waterpark, 1 Dow. & Ry. 16; Bann *v.* Dalzell, Mood. & M. 228; Arnott *v.* Redfern, 3 Bing. 353; Calton *v.* Bragg, 15 East, 223; Higgins *v.* Sargent, 2 B. & C. 348; Page *v.* Newman, 9 B. & C. 378; 4 Man. & Ry. 305. On the other hand, in Blaney *v.* Hendricks, 2 W. Black. 761; Lowndes *v.* Collins, 17 Ves. 28; Parker *v.* Hutchinson, 3 Ves. 134, it was said that interest should be allowed as matter of law.

(a) 3 C. B. N. S. 144.

(b) W. N. (1887), 184.

England, that interest, as *matter of law*, could not be given except on mercantile securities, or where there was a contract express or implied to pay it. In Higgins *v.* Sargent (a) the plaintiff brought covenant on a policy of life insurance for £4,000, payable six months after proof of death. The jury having found a general verdict for the plaintiff without any question being raised as to the allowance of interest, it was then for the first time claimed that interest should be added from the time the sum became due. Abbott, C. J., said:

"It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. . . . . The only question upon the present rule is whether the jury ought to have been told that they were bound by law to give the plaintiff interest from that time. . . . . Inasmuch as the money recovered in this cause was not due by virtue of a mercantile instrument, and as there was no contract, expressed or implied, on the part of the defendant to pay interest, I cannot say that the jury ought to have been told that they were bound to give interest."

In Shaw *v.* Picton (b) the plaintiff sued for work and labor, and money lent, and on an account stated. Abbott, C. J., said:

"We are all of opinion that the plaintiff cannot substantiate any claim for interest. The general rule is, that interest is not due by law for money lent, unless from the usage of trade or the dealings between the parties, a contract for interest is to be implied. Here no such contract is to be implied, for there is no usage of trade; and it does not appear by the case that any interest had ever been brought into the account on either side."

In Page *v.* Newman (c) the plaintiff sued on the following instrument: "Guerêt, April 18th, 1814. In one

(a) 2 B. & C. 348. (b) 4 B. & C. 715, 723. (c) 9 B. & C. 378.

month after my arrival in England, I promise to pay Captain W. E. Page, or order, the sum of £135, as sterling for value received. C. Newman." Lord Tenterden, C. J., said: "It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest." After citing Higgins *v.* Sargent, *supra*, he said:

"If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in Arnott *v.* Redfern (a) would seem to warrant, viz., that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavored to obtain payment of it, it might frequently be made a question at Nisi Prius whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments. Here the language of the instrument is such as to lead to the conclusion that the parties did not intend that interest should be payable."

§ 289. **Interest by statute—Discretionary power of jury.**—In many cases the allowance of interest is governed by the statute 3 & 4 W. IV, c. 42, §§ 28, 29, which declares "that upon all debts or sums certain, payable at a certain time, or otherwise, the jury on the trial of any issue, or on any inquisition of damages, *may, if they shall* think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when said debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when

(a) 3 Bing. 353.

demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment, provided that interest shall be payable in all cases in which it is now payable in law." The act also allows interest, in the discretion of the jury, in actions of trover, trespass *de bonis asportatis*, and on policies of insurance, and expressly provides for the allowance of interest wherever it was previously allowed. This statutory regulation recognizes the hardship of the old rule, but leaves the matter in great uncertainty, the whole thing being given to the discretion of a jury in the particular case.

In an action of debt for goods sold and delivered,[a] it was found that the defendant had agreed, at the time of the contract, to give a bill or note for the price. The jury gave interest, and it was held right.

In Hill *v.* South Staffordshire Ry. Co.[b] the question of the allowance of interest, both at common law and under the statute, was considered. The plaintiff agreed to build a road for the defendant, payments to be made monthly as the work proceeded, on the engineer's certificate. There was no provision about interest. The plaintiff made a demand for a sum as the balance due him, with interest. His accounts were disputed, and, on a bill filed, he was proved to be entitled to about one-half his claim. Sir Charles Hall, V. C., in his opinion, said: "According to the contract, if it went on that, apart from the statute, there must be an express contract for the payment of interest except in the case of mercantile contracts,—bills of exchange and promissory notes, and some cases which are subject to special usage in trade. It must be in the

[a] Davis *v.* Smyth, 8 M. & W. 399.
[b] L. R. 18 Eq. 154, 167, 170.

contract itself, and no case has been made out for interest in that view." After stating that the bill must be considered as a claim for damages for not making out the certificate and for the detention of money, he referred to the case of Higgins *v.* Sargent, *supra*, as settling the liability to pay interest, irrespective of the contract and the statute, "that in the absence of any express provision in the contract to pay interest, there was no liability to do so." (a) With reference to the statute, he held that the amount could not be considered a sum certain, as it was only ascertained after examination of a long account, and therefore could not be considered within its provisions. He also said:

"Even supposing that I could treat the present as a case within the 28th section, that section is not imperative; it merely empowers a jury, if 'they shall think fit,' to allow interest at a rate not exceeding a certain amount. These words give a discretion to the jury to say whether it be, under all the circumstances of it, a case in which interest ought to be allowed or not. A new trial would not, I think, be granted, because the jury had not allowed interest under that section in a case like the present. I do not believe that any twelve men dealing with and considering all the circumstances of this case, would say that interest ought to be allowed; and acting as a jury in this case it appears to me that I cannot allow interest."

§ 290. **By way of damages for detention of money.**— Interest is, however, sometimes allowed *by way of damages* for the detention of money where it is laid as special damage in the declaration. In Watkins *v.* Morgan (b) the plaintiff brought an action of debt on an indenture dated June 15, by which the defendant covenanted to pay £270, with lawful interest for the same on the 15th

(a) The Vice-Chancellor then reviewed two cases, Mildmay *v.* Methuen, 3 Drew. 91, and Mackintosh *v.* Great W. Ry. Co., 4 Giff. 683, which seemed to be opposed to this view, holding them to be poorly considered cases.

(b) 6 C. & P. 661.

of December next following. The declaration alleged that there was due the plaintiff on account of the said sum and interest, the sum of £300. It concluded to the plaintiff's damage of £10. The plea was *non est factum.* Littledale, J., said he could not allow a verdict for £300, as the contract was to pay £270 with six months' interest, which would be £276 15*s.*, and all the rest was damages for the detention; and the plaintiff having only laid these at £10, could recover no more. In Price *v.* Great W. Ry. Co.(a) the plaintiff sued on an agreement to pay a certain sum on January 15th, 1844, and interest till that date. The principal was not paid, and a special case was made for the court on the question whether interest after January 15th, 1844, could be recovered. It was stipulated that the court should have the same powers as a jury. Parke, B., said: "This is substantially a mortgage. The constant and invariable practice is to give interest by way of damages in such cases."

In a case in the House of Lords (b) the plaintiff had received from one Bevan a warrant of attorney, dated May 2d, to secure payment of money on June 2d, with interest till that time at 5 per cent. per month. Bevan died before June 2d, and no payment was made, but the plaintiff did not enter judgment. Bevan's executors did not know of the warrant of attorney. By various means the plaintiff, after the executors knew he had a claim, kept the nature of it concealed for a long time. When obliged to make it known he claimed interest at 5 per cent. per month, but Vice-Chancellor Stuart allowed it at this rate for one month only, and at 4 per cent. per annum for the rest of the time. The Lord Chancellor, Lord Cairns, after saying that this might be considered

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(a) 16 M. & W. 244. (b) Cook *v.* Fowler, L. R. 7 H. L. 27, 32.

as a judgment entered on June 2d, and which would then bear 4 per cent. interest, said (p. 32):

"If this is not merely a judgment for the principal sum and the amount of interest and costs up to the 2d of June, which judgment is thenceforward to bear interest at the rate of 4 per cent., it is at all events a warrant of attorney and defeasance which is given to secure a debt of £1,330, with interest up to a certain day, and without any mention of subsequent interest upon the face of the instrument. If so, according to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of Mounson *v.* Redshaw,(a) any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim, really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages."

After stating the facts of the case, he said (p. 34):

"Now, my Lords, if this is to be judged of (and it is the most favorable view of the case that can be taken on behalf of the appellant that it should be so judged of), as a case in which Cook is coming and claiming damages for the non-payment of a debt due to him on the 2d of June, 1864, it appears to me to be clear that any tribunal judging of that claim for damages would be bound to take into account the circumstances to which I have referred—circumstances which show that Cook was endeavoring to prevent the character of this defeasance from transpiring; that he was endeavoring to keep back his security, and thereby to become entitled to claim this high rate of interest, whereas it is obvious that, if he had at the first disclosed the nature of the claim in respect of interest, which he was prepared to allege, steps would have been taken to pay off the principal sum that

(a) 1 Wms. Saund. 201 n.

was due to him. Therefore, whether your Lordships take it as a judgment for a specific sum, bearing no interest beyond the statutable interest of 4 per cent., or whether you take it as a claim for damages for the detention of a debt, in either case it appears to me to be out of the question that the rate of 60 per cent. could be allowed. It appears to me that, in the first view, 4 per cent. is the rate absolutely assigned by statute upon the payment of judgment debts ; and, in the second case, it is for the tribunal to fix the rate of damages. It is possible that the rate of 5 per cent. might be given by a jury or by a judge who was performing the functions of a jury; but the primary judge having in this case only given the usual rate assigned in the Court of Chancery, namely, 4 per cent., I certainly do not propose to advise your Lordships to disagree with that opinion at which he has arrived, but, on the contrary, I advise and move your Lordships that this appeal should be dismissed, with costs."

Lord Hatherly said: "The cases which were cited with reference to mortgages, show clearly that the interest, after a given day, upon which day the principal and interest secured by the mortgage were made payable, can only be given in the nature of damages." He then cited the case of Cameron *v.* Smith,(a) and the language of Mr. Justice Bayley in that case, to the effect that interest on a bill is given in the nature of damages, which must go to the jury that they may find the amount; and that it is in their discretion to allow any or no interest, as may seem proper to them.

§ 291. **Result of the English cases.**—The result to be obtained from these cases is as follows: Interest is allowed in England as a matter of law: *First*, on commercial paper; *Second*, on contracts expressly providing for it; *Third*, where an agreement to pay it is implied from usage, or the dealing of the parties. It is allowable in the discretion of the jury: *First*, in cases provided for by the

(a) 2 B. & Ald. 305.

statute, *supra*; *Second*, as special damages for the detention of money.

§ 292. **Difference between English and American law.**—In the American courts interest is allowed as damages more liberally than in England. The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal, while the English courts treat it as something distinct and independent, and only to be had by virtue of some positive agreement or statute.[1]

§ 293. **Interest as damages—Frequently regulated by statute.**—It is almost universally held in this country that interest is in the proper case given as damages by the common law. A large part of the subject is, however, covered by statute in every State, and the rate of interest is probably everywhere regulated by the legislature. In some States, like Georgia and California, the subject is so thoroughly covered by statute that the common law is practically superseded.

In some States it has been held that interest is never allowed by the common law where there is no agreement for the payment of it; and therefore that it can be allowed in no case except on express agreement or unless it comes within the language of the statute allowing it.([a]) And in other States it is held that in statutory

[1] For an examination of the early English and American decisions, see Wood *et al. v.* Robins, 11 Mass. 504, and Pope *v.* Barret, 1 Mason 117, in which latter case it was held by Mr. J. Story, that interest was due when money was improperly withheld after demand. See the subject discussed, and the cases collected and cited in Alabama, in Boyd *v.* Gilchrist, 15 Ala. 849.

([a]) Denver, S. P. & P. R.R. Co. *v.* Conway, 8 Col. 1; Sammis *v.* Clark, 13 Ill. 544; Hitt *v.* Allen, 13 Ill. 592; Chicago *v.* Allcock, 86 Ill. 384; Hamer *v.* Kirkwood, 25 Miss. 95; Warren Co. *v.* Klein, 51 Miss. 807; Kenney *v.*

actions no interest can be recovered unless it is allowed by statute.([a]) With more propriety it is held that when a statute allows double damages interest cannot be given.([b])

§ 294. **Money vexatiously withheld — Statutory rule.**— Many States by statute allow interest when money is vexatiously withheld. The question whether it has been so withheld is for the jury;([c]) if it has, interest is then allowed, not from the time the delay became vexatious, but from the time payment was due.([d]) "Wrongfully and unreasonably withheld," a phrase used in some States, seems to add nothing to the common law; it appears to mean, withheld after payment was due.([e])

§ 295. **Allowance and amount of interest formerly matter for the jury.**—It was formerly held in this country that when not secured by contract, that is, when sought as damages, the allowance and amount of interest was in the discretion of the jury. This was especially urged when interest was asked upon the value of property. "There are two classes of cases," said the Supreme Court of New Hampshire, "in which interest may be recovered. The first is where it is incident to the debt, founded upon the agreement of the parties, and is a legal claim, which the court are bound to allow. The other class is where

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Hannibal & S. J. Ry. Co., 63 Mo. 99; Marshall *v.* Schricker, 63 Mo. 308; Atkinson *v.* Atlantic & P. R.R. Co., 63 Mo. 367; De Steiger *v.* Hannibal & S. J. Ry. Co., 73 Mo. 33; Kimes *v.* St. Louis, I. M. & S. Ry. Co., 85 Mo. 611; Randall *v.* Greenhood, 3 Mont. 506; Flannery *v.* Anderson, 4 Nev. 437.

([a]) Atchison, T. & S. F. R.R. Co. *v.* Gabbert, 34 Kas. 132; Atkinson *v.* Atlantic & P. R.R. Co., 63 Mo. 367; Weir *v.* Allegheny County, 95 Pa. 413; but *contra*, Orr *v.* New York, 64 Barb. 106.

([b]) Brentner *v.* Chicago, M. & S. P. Ry. Co., 68 Ia. 530.

([c]) Devine *v.* Edwards, 101 Ill. 138.

([d]) Chicago *v.* Tebbetts, 104 U. S. 120. Merely appearing and defending the suit is not vexatious delay: Aldrich *v.* Dunham, 16 Ill. 403.

([e]) Killian *v.* Eigenmann, 57 Ind. 480; Hazzard *v.* Duke, 64 Ind. 220.

interest may be allowed by a jury in the nature of damages."[1] This was generally so in actions of *tort*, as trover or trespass for taking goods, where interest was allowed at the discretion of the jury. So, in an action of trespass, the Supreme Court of New York said: "The plaintiff ought not to be deprived of his property for years without compensation for the loss of the use of it; and the jury had a discretion to allow interest in this case as damages. It has been allowed in actions of trover, and the same rule applies in trespass when brought for the recovery of property."[2] So, in Kentucky, in case of a fraudulent refusal to convey land.[3] And so declared, also, in North Carolina, in cases of trover and trespass.[4]

The discretionary rule was applied in many cases of contract. So, in an action on an agreement to deliver wheat, the value of the wheat with interest thereon was given.[5] And the Supreme Court, on the argument of the case, said: "The judge who tried the cause did not *direct the jury* to allow the interest on the sum which they should find the wheat to be worth after the demand; but in ascertaining the plaintiff's damages, he observed they *might if they thought proper*, from the nature of the transaction, include interest as an item in making up the amount of damages. There was not in this remark any direction contrary to law." "Interest," said Washington, J., on the Pennsylvania circuit, "is a question generally in the discretion of a jury."[6]

So, in two actions against the master of a ship for the

[1] McIlvaine *v.* Wilkins, 12 N. H. 474.

[2] Beals *v.* Guernsey, 8 Johns. 446. So in trover, Hyde *v.* Stone, 7 Wend. 354; Bissell *v.* Hopkins, 4 Cow. 53; Kennedy *v.* Strong, 14 Johns. 128; Hallett *v.* Novion, 14 Johns. 273, and 16 Johns. 327. And in replevin, Rowley *v.* Gibbs, 14 Johns. 385. So, in case for negligence, Thomas *v.* Weed, 14 Johns. 255.

[3] Handley *v.* Chambers, 1 Littell 358.

[4] Devereux *v.* Burgwin, 11 Iredell 490.

[5] Dox *v.* Dey, 3 Wend. 356.

[6] Gilpins *v.* Consequa, Pet. C. C. 85.

non-delivery of goods, it was held in New York that the jury might give damages if the conduct of the defendant was improper, *i. e.*, where fraud or gross misconduct could be imputed to him; but it appearing that such was not the fact, it was not allowed; and the court in the former case said: "Interest is not in every case and of course recoverable, because the amount of the loss is unliquidated, and sounds in damages to be assessed by the jury."[1] In a case in which a man covenanted to convey lands, and it afterward appeared that in truth he had no title to the land, but there was no fraud, it has been held in Virginia, that whether the jury should allow interest on the value of the land from the date of the contract must depend on the circumstances of the case, of which they are the proper judges; and that it is competent to the defendant to give in evidence any circumstances tending to show that interest should not be allowed.[2]

In Dotterer *v.* Bennett (a) the plaintiff sued on a *quantum meruit*. The jury found a verdict for $1,756, with interest from the time the right of action accrued. This was held to be error; but the jury might, if they deemed proper, give a verdict for a sum which would include interest on the true value. So generally in the earlier and in some of the later cases the allowance of interest is said to be in the discretion of the jury.(b)

[1] Watkinson *v.* Laughton, 8 Johns. 213; Amory *v.* McGregor, 15 Johns. 24.

[2] Letcher *v.* Woodson, 1 Brock. 212.

(a) 5 Rich. L. 295.

(b) Willings *v.* Consequa, Pet. C. C. 172; Oakes *v.* Richardson, 2 Low. 173; Crow *v.* State, 23 Ark. 684; Brady *v.* Wilcoxsen, 44 Cal. 239; Rogers *v.* West, 9 Ind. 400; Morford *v.* Ambrose, 3 J. J. Marsh 688; Marshall *v.* Dudley, 4 J. J. Marsh 244; Bell *v.* Logan, 7 J. J. Marsh 593; Stark *v.* Price, 5 Dana 140; Howcott *v.* Collins, 23 Miss. 398; Richmond *v.* Bronson, 5 Den. 55; Hunt *v.* Jucks, 1 Hayw. 173; Hogg *v.* Zanesville Canal and Manuf. Co., 5 Oh. 410; Obermyer *v.* Nichols, 6 Binn. 159; Close *v.* Fields, 13 Tex. 623; Heidenheimer *v.* Ellis, 67 Tex. 426.

§ 296. **Now usually a question of law.**—Language is no doubt to be found in many cases which seems to imply that the court has the same discretion that the jury formerly had, and to place the allowance of interest on grounds of general equity. In Rensselaer Glass Factory *v.* Reid,[a] Colden, Senator, said: "As often as the question of interest has been before a court, the judges seem to have considered it as depending on general equitable principles; and, in most instances, to have decided each case in reference to its particular circumstances, without attempting to give any rule which might be generally applicable." But it is now perfectly well settled that in most classes of cases the allowance of interest is a question of law.[b]

In Dana *v.* Fiedler,[c] Johnson, J., used the following language:

"In all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury. If the giving or refusing interest rests in discretion, the law, to be consistent, should furnish some legitimate means of influencing its exercise by evidence, as by showing that the party in fault has failed to perform, either wilfully or by mere accident, and without any moral misconduct. All such considerations are constantly excluded from a jury, and they are properly told that in such an action their duty is to inquire whether a breach of the contract has happened, not what motives induced the breach. . . . . The right to interest, in actions upon contract, depends not upon discretion, but upon legal right."

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[a] 5 Cow. 587, 596.

[b] Broughton *v.* Mitchell, 64 Ala. 210; Hamer *v.* Hathaway, 33 Cal. 117; Andrews *v.* Durant, 18 N. Y. 496; De Lavallette *v.* Wendt, 75 N. Y. 579; Robinson *v.* Corn Exchange Insurance Co., 1 Abb. N. S. 186; Wehle *v.* Butler, 43 How. Pr. 5; Rhemke *v.* Clinton, 2 Utah 230.

[c] 12 N. Y. 40, 50.

§ 297. **Gradual extension of principles allowing interest as matter of law.**—The gradual extension of the principles allowing interest as damages is clear. Beginning with a denial of interest in any case except where it was allowed by contract, the law first gave discretion to the jury to give interest as damages, and then allowed it as a matter of law in a constantly increasing number of cases. This has led the Supreme Court of North Carolina (a) to say:

"Although it (b) has not in cases like this yet been defined by clearly cut rules, and has therefore usually been left to the discretion of a jury, yet in the progress of the law as a science it must and will be so defined; and the question in what cases interest shall be allowed, and in what not, will be recognized as properly coming within the duty of judicial instruction, just as the question of the measure of damages now is, although until recently questions of that sort were considered too versatile and various to admit of being governed by certain principles, and were left, necessarily as was supposed, to the discretion of a jury."

§ 298. **Interest by custom.**—Where by custom known to the defendant interest is charged, a contract will be implied to pay the interest, and the defendant will be held to pay it. Thus, in New York,[1] interest has been allowed on the account of a forwarding merchant, on the ground of a universal custom to charge interest on such accounts, the custom being known to the defendant; and Savage, C. J., said: "Interest is always properly chargeable when there is either an express or an implied agreement to pay it." (c) A custom not proved

[1] Meech *v.* Smith, 7 Wend. 315.

(a) Rodman, J., in Lewis *v.* Rountree, 79 N. C. 122, 128.

(b) That is, the allowance of interest.

(c) Ayers *v.* Metcalf, 39 Ill. 307; Veiths *v.* Hagge, 8 Ia. 163; Reab *v.* M'Allister, 4 Wend. 483; 8 Wend. 109. But under a statute which forbids the recovery of interest at more than a certain rate unless expressly stipu-

to be known to the debtor at the time of contracting the debt will not be sufficient to charge him with interest.(a) But a general custom is presumed to be known, and upon such a custom the debtor may be charged with interest.(b) Thus the general custom of Philadelphia merchants to charge their country customers interest on each item after six months seems to have become part of the law; no knowledge need be shown on the part of the debtor.(c) And the same is true of a custom in Vermont, to charge interest on each item of an account a year after it is entered.(d)

§ 299. **Liquidated and unliquidated demands.**—Having now examined this subject of interest in its historical aspect, and shown how, beginning with a general disallowance of it, the law has now come to admit principles the establishment of which render its allowance necessary in certain classes of cases, we proceed to inquire into the particular rules governing this allowance. And here we shall find that the determination of the question whether interest can or cannot be allowed, is by no means free from difficulty. The most general classification of causes of action with reference to interest is into liquidated and unliquidated demands. And it was formerly attempted to lay down the rule that interest could be recovered only on liquidated demands. But it will be perceived that not only is the distinction itself not by any means easy to keep in view, but besides this there is no reason

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lated, no more than that rate can be recovered though the custom allows a higher rate: Turner *v.* Dawson, 50 Ill. 85.

(a) Rayburn *v.* Day, 27 Ill. 46; Dickson *v.* Surginer, 3 Brev. 417.

(b) Fisher *v.* Sargent, 10 Cush. 250.

(c) Knox *v.* Jones, 2 Dall. 193; Bispham *v.* Pollock, 1 McLean 417; Koons *v.* Miller, 3 W. & S. 271; Watt *v.* Hoch, 25 Pa. 411; Adams *v.* Palmer, 30 Pa. 346.

(d) Wood *v.* Smith, 23 Vt. 706; Davis *v.* Smith, 48 Vt. 52.

in the nature of things why the fact of a demand being unliquidated should debar the plaintiff from receiving or exempt the defendant from paying interest. And finally, we do not find as a matter of fact that the line between cases in which interest is allowed, and cases in which it is refused, corresponds with the line between liquidated and unliquidated demands. That there is a broad, general distinction between a claim sounding in damages and entirely unliquidated, and what is called a liquidated demand, is not to be denied. For an example, we may take the case of a claim for damages for personal injury arising from assault and battery, or a case of seduction, or libel. There the elements from which to ascertain the amount of the demand are wholly at large. The defendant has no means of knowing in advance of proof what the precise pecuniary damage has been, still less what should be allowed for pain and suffering. Even the plaintiff, short of an assessment of damages by a jury, cannot give him the necessary information. Down to the time of verdict the claim is entirely unliquidated. On the other hand, the commonest example of a liquidated demand is an action of debt, where there is an express contract to pay a sum certain at a fixed time. Here all the conditions are reversed. The claim is wholly liquidated; both parties know exactly what it is and when it is to be paid. Interest in such a case represents the exact value of the use of an ascertained sum of money for a fixed period during which the plaintiff is deprived of it. Between these two extreme cases the whole body of the law lies, and it will be found that in this middle ground the demands approach or depart from the type of a liquidated demand in every variety of degree. Thus in the ordinary case of conversion of property, if the property be money, or mercantile securi-

ties, the case closely resembles, in its relation to interest, one of debt; if it be property of a fluctuating or peculiar value, the resemblance is not nearly so close. So in the case of trespass to lands, the claim is generally of the kind which cannot be liquidated short of a verdict.

§ 300. **Unsatisfactory character of the test.**—But the objection to this classification lies not only in its difficulty of application, which might perhaps be surmounted; but in the fact of its unfairness. There is no reason why a person injured should have a smaller measure of recovery in one case than the other. There is no reason why the damages to be paid by the defendant should be mitigated or reduced by the circumstance that his tort or breach of contract was of such an aggravated or cunningly perfidious character as to make a liquidation of the claim against him difficult. On general principles, once admit that interest is the natural fruit of money, it would seem that wherever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date. We shall now examine the rules laid down by the courts more in detail. As we proceed in this inquiry we shall find that there are two tests which are constantly applied by the courts, having been found by them more useful than the attempted division into liquidated and unliquidated demands. Of these the first is whether the demand is of such a nature that its exact pecuniary amount was either *ascertained*, or *ascertainable* by simple computation, or by reference to generally recognized standards such as market price; second, whether the time from which interest, if allowed, must run,—that is, a time of definite default or tort-feasance,—can be ascertained. This point of time is a fundamental part of the question in every case; and generally speaking, where interest is not allowed, as in actions of assault and battery,

seduction, libel, and false imprisonment, the reason is connected with this.

§ 301. **Liquidated demands—General rule.**—Two rules for the allowance of interest on liquidated demands are to be deduced from the cases. 1st. Wherever there has been a contract to pay money at a given time, interest is to be allowed from the time the money should have been paid. 2d. Where money has been wrongfully acquired or detained, interest is to be computed from the time of the wrongful acquisition, or detention. Both cases depend upon the principle that the defendant has been guilty of a legal default in not paying over money to which he had no right.

When a debtor makes default in the payment of a liquidated sum of money, the creditor recovers interest by way of compensation from the time the money should have been paid.(a) "Whenever the debtor knows what he is to pay, and when he is to pay it, he shall be charged with interest if he neglects to pay." (b) "By the law as settled in this commonwealth, interest is to be allowed in all cases, where either by express contract or by implication, it is the duty of a party to pay over money due without any previous demand by the creditor. When a

(a) Curtis *v.* Innerarity, 6 How. 146; Whitworth *v.* Hart, 22 Ala. 343; Cheek *v.* Waldrum, 25 Ala. 152; Flinn *v.* Barber, 64 Ala. 193; Broughton *v.* Mitchell, 64 Ala. 210; Caldwell *v.* Dunklin, 65 Ala. 461; Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Park *v.* Wiley, 67 Ala. 310; Peoria M. & F. I. Co. *v.* Lewis, 18 Ill. 553; Clark *v.* Dutton, 69 Ill. 521; Harper *v.* Ely, 70 Ill. 581; Dobbins *v.* Higgins, 78 Ill. 440; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Stern *v.* People, 102 Ill. 540; Hall *v.* Huckins, 41 Me. 574; Newson *v.* Douglass, 7 H. & J. 417; Judd *v.* Dike, 30 Minn. 380; Buzzell *v.* Snell, 25 N. H. 474; Stuart *v.* Binsse, 10 Bosw. 436; Gutta Percha & R. M. Co., *v.* Benedict, 37 N. Y. Super. Ct. 430; Spencer *v.* Pierce, 5 R. I. 63; Hauxhurst *v.* Hovey, 26 Vt. 544; Sampson *v.* Warner, 48 Vt. 247; Butler *v.* Kirby, 53 Wis. 188.

(b) People *v.* New York, 5 Cow. 331.

definite time is fixed for the payment of a sum of money, the law raises a promise to pay damages, by way of interest at the legal rate for the detention of the money after the breach of the contract for its payment."[a] "Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for the failure to keep a contract, interest attaches as an incident."[b] Thus in an action of debt, interest is assessed as damages for detention of the debt.[c] In an action on a promissory note interest is allowed after maturity though the note does not in terms bear interest.[d] So where the note provided for interest at an usurious rate, and by statute such interest was forfeited, interest at the legal rate was allowed after maturity.[e] Where a certain sum is due as liquidated damages on a contract, interest may be recovered upon it from the breach of the contract.[f] So interest is allowed on a pecuniary legacy from the time it should be paid over; which in most States is a year after the death of the testator;[g] and interest is allowed on the amount due on an insurance policy from the time it was payable.[h]

[a] Bigelow, C. J., in Foote *v.* Blanchard, 6 All. 221.

[b] Brickell, J., in Alabama *v.* Lott, 69 Ala. 147, 155

[c] 1 Wms. Saund. 201 n; Osbourne *v.* Hosier, 6 Mod. 167; Wilmans *v.* Bank of Illinois, 6 Ill. 667; North R. M. Co. *v.* Christ Church, 22 N. J. L. 425; Sayre *v.* Austin, 3 Wend. 496; Sumner *v.* Beebe, 37 Vt. 562.

[d] Gibbs *v.* Fremont, 9 Ex. 25; Kitchen *v.* Branch Bank at Mobile, 14 Ala. 233; Swett *v.* Hooper, 62 Me. 54.

[e] Fisher *v.* Bidwell, 27 Conn. 363.

[f] Mead *v.* Wheeler, 13 N. H. 351; Little *v.* Banks, 85 N. Y. 258; Winch *v.* Mutual B. I. Co. 86 N. Y. 618. In Texas, from the filing of the suit: Yellow Pine L. Co. *v.* Carroll, 76 Tex. 135.

[g] Custis *v.* Adkins, 1 Houst. 382; Rice *v.* Boston, P. & S. A. Soc., 56 N. H. 191; Hennion *v.* Jacobus, 27 N. J. Eq. 28; Devlin's Estate, Tucker (N. Y.) 460; German *v.* German, 7 Coldw. 180; Vermont S. B. C. *v.* Ladd, 58 Vt. 95.

[h] Field *v.* Insurance Co. of N. A., 6 Biss. 121; Swamscot M. Co. *v.* Partridge, 25 N. H. 369, 380.

Interest is not allowable on the recovery of the whole amount of a premium note for the non-payment of an assessment, because it is a penalty and in no sense money due.(a) But where the suit on the note is only for the amount of the assessments for losses actually incurred, interest is chargeable from the date when the assessments were payable.(b) Where one partner fails to advance his share of capital, according to agreement, the measure of damages is interest on the amount that should have been furnished.(c)

§ 302. **Time from which interest runs.**—In each case all the circumstances of the transaction must be considered in order to determine when the defendant was in default. Where the money is payable at a fixed time, interest is allowed from that time. When it is payable on demand, interest runs only from the time of demand. So where a bank has stopped payment, interest is not allowed in England upon its notes payable on demand until they have been presented for payment.(d) Where, however, a bond is given, conditioned for the payment of money, and it is not made payable either upon demand or at a fixed time, it is held that interest runs from the date of the bond.(e) Where payment is postponed to some future day, or till the happening of some event, interest should be allowed from that day, or from the happening of that event. Thus where labor was to be paid for in mortgages and promissory notes, it was held that interest could only be allowed from the time the notes would have fallen due.(f) Where money is payable on demand,

(a) Bangs *v.* McIntosh, 23 Barb. 591 ; Bangs *v.* Bailey, 37 Barb. 630.
(b) Hyatt *v.* Wait, 37 Barb. 29.
(c) Krapp *v.* Aderholt, 42 Kas. 247.
(d) *In re* Herefordshire Banking Co., L. R. 4 Eq. 250.
(e) Purdy *v.* Philips, 11 N. Y. 406; Kent *v.* Kent, 28 Gratt. 840.
(f) Tiernan *v.* Granger, 65 Ill. 351.

and no demand is made prior to the commencement of the action, interest from that time can be recovered. The commencement of the action is a demand.(a) Where a lunatic transferred stock, and afterward sued the corporation to recover dividends, interest was held recoverable on the dividends from the time the lunacy was judicially established, to the knowledge of the corporation.(b) In Hastings *v.* Westchester Fire Ins. Co.,(c) a fire insurance policy made the loss payable sixty days after notice and proof of loss. It was held that interest was to be allowed from the expiration of the sixty days, and not from the adjustment of the loss.

§ 303. **Money illegally acquired or used.**—Where a party knowingly keeps money which he has no right to, he is chargeable with interest from the time he should have paid it over. Thus where a defendant is sued for money fraudulently obtained, he is chargeable with interest from the time of receiving the money.(d) So he is chargeable with interest on money illegally exacted and paid under protest.(e) When money is received by a party who improperly converts it to his own use, he must pay interest from the time of such conversion.(f) So when

(a) Gammell *v.* Skinner, 2 Gall. 45; Hunter *v.* Wood, 54 Ala. 71; Hall *v.* Farmers' & C. S. B. 55 Ia. 612; House *v.* McKenney, 46 Me. 94; Hunt *v.* Nevers, 15 Pick. 500; Harrison *v.* Conlan, 10 All. 85; Thwing *v.* Great Western I. Co., 111 Mass. 93; Rawson *v.* Grow, 4 E. D. Smith 18.

(b) Chew *v.* Bank of Baltimore, 14 Md. 299.

(c) 73 N. Y. 141.

(d) Wood *v.* Robbins, 11 Mass. 504; Atlantic N. B. *v.* Harris, 118 Mass. 147; Manufacturers' N. B. *v.* Perry, 144 Mass. 313; Silver V. M. Co. *v.* Baltimore G. & S. M. & S. Co., 99 N. C. 445.

(e) Stewart *v.* Schell, 31 Fed. Rep. 65; Graham *v.* Chicago M. & S. P. Ry. Co., 53 Wis. 473.

(f) London Bank *v.* White, L. R. 4 App. Cas. 413; Kirkman *v.* Vanlier, 7 Ala. 217; Lewis *v.* Bradford, 8 Ala. 632; White *v.* Lyons, 42 Cal. 279; Robbins *v.* Laswell, 58 Ill. 203; Stern *v.* People, 102 Ill. 540; Cassady *v.* Trustees of Schools, 105 Ill. 560; Taylor *v.* Knox, 1 Dana 391; Andrews *v.*

money has been improperly withheld by a public officer, or where a sheriff retains money after the return day of the execution, he is liable for interest.[1](a) So, in an action on a constable's bond, for not paying over money collected by him under an execution, it was held that interest should be allowed.(b)

Where a person holding a fiduciary relation to another retains money after being required to pay it over, interest runs from the time when it should have been paid over;(c) and where a trustee mingles the trust funds with his own, he must pay interest on the amount.(d) In Jefferson City Savings Association *v.* Morrison,(e) the plaintiff, as assignee, brought an action for money had and received. The action was based on a receipt stating that part of

[1] Slingerland *v.* Swart, 13 Johns. 255; Crane *v.* Dygert, 4 Wend. 675.

Clark, 20 Atl. Rep. 429 (Md.); Hubbard *v.* Charlestown B. R.R. Co., 11 Met. 124; Goff *v.* Rehoboth, 2 Cush. 475; Hill *v.* Hunt, 9 Gray 66; Dunlap *v.* Watson, 124 Mass. 305; Crabtree *v.* Randall, 133 Mass. 552; Tarpley *v.* Wilson, 33 Miss. 467; Hudson *v.* Tenney, 6 N. H. 456; Lynch *v.* DeViar, 3 Johns. Cas. 303; People *v.* Gasherie, 9 Johns. 71; Greenly *v.* Hopkins, 10 Wend. 96; White *v.* Smith, 54 N. Y. 522; Griggs *v.* Griggs, 56 N. Y. 504; Com. *v.* Crevor, 3 Binn. 121; Crane *v.* Thayer, 18 Vt. 162; School Dist. *v.* Dreutzer, 51 Wis. 153.

(a) Paige *v.* Willet, 38 N. Y. 28; Thompson *v.* Sweet, 73 N. Y. 622.

(b) Magner *v.* Knowles, 67 Ill. 325.

(c) Rapelie *v.* Emory, 1 Dall. 349; Shipman *v.* Miller, 2 Root 405; Sanders *v.* Scott, 68 Ind. 130; White *v.* Ditson, 140 Mass. 351; Pickering *v.* De Rochemont, 60 N. H. 179; Slingerland *v.* Swart, 13 Johns. 255; Lyons *v.* Chamberlin, 25 Hun 49; Monroe County *v.* Clarke, 25 Hun 282; Neal *v.* Freeman, 85 N. C. 441; McRae *v.* Malloy, 87 N. C. 196; Simpson *v.* Feltz, 1 McC. Eq. 213.

(d) Aldridge *v.* McClelland, 36 N. J. Eq. 288; Manning *v.* Manning, 1 Johns. Ch. 527; Duffy *v.* Duncan, 35 N. Y. 187; Hess' Estate, 68 Pa. 454; Norris' Appeal, 71 Pa. 106, 123; Perkins *v.* Hollister, 59 Vt. 348. If profits were made, the plaintiff has the option to recover the profits or interest. Kyle *v.* Barnett, 17 Ala. 306; Whitney *v.* Peddicord, 63 Ill. 249. For the recovery of compound interest, see § 342 ff.

(e) 48 Mo. 273.

the money was to be placed to the account of the assignor of the chose in action on an obligation of his to a third party. The defendant having failed to place it to his account, interest on the amount was given. In delivering the decision the following language was used by the court: "Where money is received by a party who applies it to his own use, or otherwise detains it, it is but just that he should pay interest upon the money so used or detained, and the courts of this country hold him to that liability. If, therefore, the defendant in this cause applied the funds intrusted to him to his own use, or otherwise improperly detained them, he should be held liable for the interest." An agent with whom money is deposited for a definite owner is chargeable with the interest which he receives for the use of such money.([a])

§ 304. **Money paid out for the defendant.** — Where money is advanced to a party at his request, or by one who is entitled to make such advances (as an agent or trustee), the money advanced bears interest from the time it is paid out.([b]) So where the plaintiff has been compelled to pay money for which, in equity, he must be reimbursed by the defendant (as when he was surety for the defendant), he may recover interest from the

([a]) Bassett *v.* Kinney, 24 Conn. 267.

([b]) Craven *v.* Tickell, 1 Ves. jr. 60; Howard *v.* Behn, 27 Ga. 174; Underhill *v.* Gaff, 48 Ill. 198; Cease *v.* Cockle, 76 Ill. 484; Goodnow *v.* Litchfield, 63 Ia. 275; Goodnow *v.* Plumbe, 64 Ia. 672; Taylor *v.* Knox, 1 Dana 391; Winthrop *v.* Carleton, 12 Mass. 4; Weeks *v.* Hasty, 13 Mass. 218; Gibbs *v.* Bryant, 1 Pick. 118; Isley *v.* Jewett, 2 Met. 168; French *v.* French, 126 Mass. 360; Chamberlain *v.* Smith, 1 Mo. 718; Ashuelot R.R. Co. *v.* Elliot, 57 N. H. 397; Gillet *v.* Van Rensselaer, 15 N.Y. 397; Milne *v.* Rempublicam, 3 Yeates 102; Hodges *v.* Hodges, 9 R. I. 32; Cheesborough *v.* Hunter, 1 Hill (S. C.) 400; Sollee *v.* Meugy, 1 Bail. 620; Walters *v.* McGirt, 8 Rich. 287; Barr *v.* Haseldon, 10 Rich. Eq. 53; Grimes *v.* Hagood, 19 Tex. 246; Fisk *v.* Brunette, 30 Wis. 102.

time of payment.[a] This is recovered as damages, and should be at the legal rate, no matter what was the rate due on the obligation discharged by the surety.[b]

In a suit for contribution between co-sureties, the plaintiff may recover interest.[c] So in a suit against a co-tenant for recovery of the plaintiff's share of the profits.[d] Where two parties are to advance money equally for a common undertaking, one who advances more than his share is entitled to interest on the excess.[e] In the case of a trading partnership, however, it is generally held that one partner who makes advances to the firm, or puts in more than his share of capital, cannot, in absence of agreement or custom, recover interest,[f] though in some States he is allowed to do so.[g] It is usually held that money lent by the plaintiff to the defendant in the absence of agreement bears interest from the time of the loan.[h]

§ 305. Money had and received by the defendant.— Where a defendant, as for instance a mere depositary or

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[a] Petre *v.* Duncombe, 15 Jur. 86; 20 L. J. Q. B. 242; Smith *v.* Johnson, 23 Cal. 63; Miles *v.* Bacon, 4 J. J. Marsh 457; Hastie *v.* De Peyster, 3 Cai. 190; Thompson *v.* Stevens, 2 N. & McC. 493; Sims *v.* Goudelock, 7 Rich. 23.

[b] Smith *v.* Johnson, 23 Cal. 63. It has been held in Georgia, however, that the surety, being substituted for the principal creditor, could recover interest only if it was due on the principal obligation, and at the rate there stipulated. Knight *v.* Mantz, 1 Ga. Dec. 22.

[c] Breckinridge *v.* Taylor, 5 Dana 110; Aikin *v.* Peay, 5 Strobh. 15.

[d] Scott *v.* Guernsey, 60 Barb. 163, 180; Early *v.* Friend, 16 Gratt. 21; Vance *v.* Evans, 11 W. Va. 342.

[e] Buckmaster *v.* Grundy, 8 Ill. 626.

[f] Prentice *v.* Elliott, 72 Ga. 154; Lee *v.* Lashbrooke, 8 Dana 214; Sweeney *v.* Neely, 53 Mich. 421; Clark *v.* Warden, 10 Neb. 87; Morris *v.* Allen, 14 N. J. Eq. 44 (*semble*); Jones *v.* Jones, 1 Ired. Eq. 332; Holden *v.* Peace, 4 Ired. Eq. 223.

[g] Reynolds *v.* Mardis, 17 Ala. 32; Hodges *v.* Parker, 17 Vt. 242.

[h] Trelawney *v.* Thomas, 1 H. Bl. 303; Butler *v.* Butler, 10 R. I. 501. But *contra*, Hubbard *v.* Charlestown B. R.R. Co., 11 Met. 124.

disbursing agent, rightfully held money belonging to the plaintiff, he is liable for interest only after a demand for payment.(a) So where an agent receives money for his principal and is under no obligation, by contract or otherwise, immediately to pay it over, the principal can recover interest only after demand.(b) So where the defendant received payment for services rendered jointly by himself and the plaintiff, the plaintiff could not recover interest on his share without demand.(c) But where it is the duty of the party into whose hands money of another comes to pay it over in a reasonable time, or at least to inform the owner of its receipt, interest is allowed after the lapse of a reasonable time.(d)

In Stacy *v.* Graham (e) the defendant was instructed by a third party to remit some money he held to one Adams. The money was for the use of the plaintiff, although this was not known to the defendant. On failing to remit it, it was held that he must be charged with interest. Ruckman *v.* Pitcher (f) was an action against a stakeholder who, under plaintiff's direction, had paid over the money to the winner of a wager. It was held that the plaintiff could recover interest from the

(a) U. S. *v.* Curtis, 100 U. S. 119; U. S. *v.* Denvir, 106 U. S. 536; Ingersoll *v.* Campbell, 46 Ala. 282; Jones *v.* Mallory, 22 Conn. 386; Myers *v.* Walker, 24 Ill. 133; Jessoy *v.* Horn, 64 Ill. 379; Talbot *v.* Com. N. Bank, 129 Mass. 67; Black *v.* Goodman, 1 Bail. 201; Close *v.* Fields, 13 Tex. 623; Haswell *v.* Farmers' & M. B., 26 Vt. 100.

(b) Pope *v.* Barret, 1 Mason 117; Wheeler *v.* Haskins, 41 Me. 432; Ellery *v.* Cunningham, 1 Met. 112; Beardslee *v.* Horton, 3 Mich. 560; Williams *v.* Storrs, 6 Johns. Ch. 353; Neal *v.* Freeman, 85 N. C. 441; Porter *v.* Grimsley, 98 N. C. 550; Hauxhurst *v.* Hovey, 26 Vt. 544.

(c) Neal *v.* Keel, 4 T. B. Mon. 162.

(d) Chapman *v.* Burt, 77 Ill. 337; Clark *v.* Moody, 17 Mass. 145, 149; Dodge *v.* Perkins, 9 Pick. 368; Board of Justices *v.* Fennimore, 1 N. J. L. 242.

(e) 14 N. Y. 492.

(f) 20 N. Y. 9.

time of a demand, on the ground that he had never lost his right to the money and was entitled to its return when demanded. In Dodge *v.* Perkins ([a]) the defendant, an agent, had collected money for his principal, but had neglected to pay it over, or to notify his principal that he had received it. In an action for money had and received, it was held that the agent should have notified his principal of the receipt of the money after a reasonable time, and having failed to do so interest should be allowed. The court, after reviewing many of the cases on the subject, said: "Upon the principles of the common law we think it clear that interest is to be allowed where the law by implication makes it the duty of the party to pay over the money to the owner without any previous demand on his part. Thus, where it was obtained and held by fraud, interest should be calculated from the time when it was received. So where there has been a default of payment according to agreement, express or implied, to pay on a day certain, or after demand or after reasonable time." ([b]) In Thompson *v.* Stewart ([c]) the court used the following language: "Had it become the duty of the defendant to pay the money to his principal, if through *wrong* or *neglect* he had detained it, it would be reasonable that interest for the detention should be allowed."

§ 306. **Money received or retained by mutual mistake.**— Where the defendant has money of the plaintiff through mutual mistake, there can be no interest till demand.([d])

([a]) 9 Pick. 368, 388.

([b]) See *acc.* Chapman *v.* Burt, 77 Ill. 337; Close *v.* Fields, 13 Tex. 623.

([c]) 3 Conn. 171.

([d]) Northrop *v.* Graves, 19 Conn. 548; Haven *v.* Foster, 9 Pick. 112; Sibley *v.* Pine County, 31 Minn. 201; Ashhurst *v.* Field, 28 N. J. Eq. 315; Jacobs *v.* Adams, 1 Dall. 52; Simons *v.* Walter, 1 McC. 97. But in Illinois interest is payable (by statute) only where there is an unreasonable or vexatious delay *after* demand: Devine *v.* Edwards, 101 Ill. 138.

So where an account is underpaid by mutual mistake, there can be no interest on the balance till demand.(a)

§ 307. **Rent—Distraint.**—Where rent due by an agreement is not paid, interest may be recovered on the amount from the day on which it should have been paid.(b) So in an action for use and occupation, or for mesne profits, where the recovery is of a sum in the nature of rent, interest is allowed on each annual sum from the end of the year;(c) or where rent was payable quarterly, from the quarter day.(d) And so on breach of a contract to hire rooms at a certain price the defendant was held to pay interest from the end of the term on the difference between the contract price and that obtained on reletting the rooms.(e) But where the landlord distrains, it must be only for the amount of the rent, without interest; that remedy is to recover the rent, not damages for delay in paying it.(f)

§ 308. **Price of property or work fixed—Sales—Action for price.**—There can be no doubt (though it has not always been so held) that where goods are sold or work done at

(a) Second & Third St. Pass. Ry. Co. *v.* Philadelphia, 51 Pa. 465; Brainerd *v.* Champlain Transp. Co., 29 Vt. 154.

(b) Stockton *v.* Guthrie, 5 Harr. 204; Walker *v.* Hadduck, 14 Ill. 399; West Chicago Alcohol Works *v.* Sheer, 8 Bradw. 367; Honore *v.* Murray, 3 Dana 31; Elkin *v.* Moore, 6 B. Mon. 462; Burnham *v.* Best, 10 B. Mon. 227; Dennison *v.* Lee, 6 G. & J. 383; Howcott *v.* Collins, 23 Miss. 398; Clark *v.* Barlow, 4 Johns. 183; Van Rensselaer *v.* Jones, 2 Barb. 643; Ten Eyck *v.* Houghtaling, 12 How. Pr. 523; Albright *v.* Pickle, 4 Yeates 264; Obermyer *v.* Nichols, 6 Binn. 159; Buck *v.* Fisher, 4 Whart. 516; Naglee *v.* Ingersoll, 7 Pa. St. 185; Newman *v.* Keffer, 33 Pa. 442. *Contra:* Cooke *v.* Wise, 3 H. & M. 463; but by a statute immediately passed interest is allowed on arrears of rent, Brooks *v.* Wilcox, 11 Gratt. 411, 419.

(c) Cooke *v.* Farinholt, 3 Ala. 384; Worrall *v.* Munn, 38 N. Y. 137; Early *v.* Friend, 16 Gratt. 21; Bolling *v.* Lersner, 26 Gratt. 36.

(d) Hodgkins *v.* Price, 141 Mass. 162; Jackson *v.* Wood, 24 Wend. 443; Vandevoort *v.* Gould, 36 N. Y. 639.

(e) De Lavalette *v.* Wendt, 75 N. Y. 579.

(f) Lansing *v.* Rattoone, 6 Johns. 43.

a fixed price, the demand is a liquidated one, and interest may be recovered on the amount from the time payment is due. So where goods are sold for cash, interest may be recovered on the price from the time of sale ;([a]) and if no time of credit is given, it will be held a cash sale, and interest will be given from the time of the sale.([b]) Where goods are sold on credit, interest may be recovered from the expiration of the credit.([c]) If no time is fixed for payment, interest may be recovered from the time of demand,([d]) or from the date of the writ if there has been no demand.([e])

In accordance with these cases, where a purchaser refused to accept goods he had bought at auction, he was held to pay interest on the difference between the price he bid and that obtained on a resale ([f]) (which was in effect the balance of the purchase-money). So where the purchaser of land took possession of it, but the time for conveyance was delayed, though without his fault, he was required to pay interest on the purchase-money.([g]) If the price is fixed by the contract, the fact that there is a dispute about the quantity or quality of the goods

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([a]) Waring *v.* Henry, 30 Ala. 721; Maltman *v.* Williamson, 69 Ill. 423; Wyandotte & K. C. G. Co. *v.* Schliefer, 22 Kas. 468; Henderson C. M. Co. *v.* Lowell Machine Shops, 86 Ky. 668; Smith *v.* Shafler, 50 Md. 132; Foote *v.* Blanchard, 6 All. 221; Pollock *v.* Ehle, 2 E. D. Smith 541.

([b]) Atlantic P. Co. *v.* Grafflin, 114 U. S. 492; Shields *v.* Henry, 31 Ala. 53; Roberts *v.* Wilcoxson, 36 Ark. 355; Sturges *v.* Green, 27 Kas. 235; Pollock *v.* Ehle, 2 E. D. Smith 541.

([c]) Milton *v.* Blackshear, 8 Fla. 161; Wiltburger *v.* Randolph, Walker (Miss.) 20; National Lancers *v.* Lovering, 30 N. H. 511; Blakeley *v.* Jacobson, 9 Bosw. 140; Raymond *v.* Isham, 8 Vt. 258; Porter *v.* Munger, 22 Vt. 191. But *contra*, Gammage *v.* Alexander, 14 Tex. 414.

([d]) Milton *v.* Blackshear, 8 Fla. 161; Livermore *v.* Rand, 26 N. H. 85.

([e]) McIlvaine *v.* Wilkins, 12 N. H. 474.

([f]) Blackwood *v.* Leman, Harp. 219; Wolfe *v.* Sharp, 10 Rich. 60.

([g]) Ballard *v.* Shutt, 15 Ch. D. 122; Sohier *v.* Williams, 2 Curt. C. C. 195; Fasholt *v.* Reed, 16 S. & R. 266.

delivered does not relieve the defendant from the payment of interest on the sum due.([a])

It has been held in some jurisdictions that interest may be recovered after a reasonable time for payment has expired. Thus in Beers *v.* Reynolds ([b]) the plaintiff sold some goods to the defendant for a fixed price. Gardiner, J., said: "No precise time of credit was given. When, therefore, after a reasonable time had elapsed, and the account was presented, and impliedly admitted, the defendants were in default for withholding payment, and interest was properly chargeable from the time of the demand."

The same is true in actions to recover for work done at an agreed price. Where the price was to be paid on a fixed day, interest runs from that time.([c]) Where no time is fixed for payment, interest runs from demand; ([d]) or if there has been no demand, from the date of the writ.([e]) And where payment has been long delayed it has been held that the jury may give interest from the expiration of a reasonable time; the allowance of interest being said to rest in the discretion of the jury in the sense that they can fix the time for it to begin running.([f])

([a]) West Republic Mining Co. *v.* Jones, 108 Pa. 55; Vaughan *v.* Howe, 20 Wis. 497.

([b]) 11 N. Y. 97.

([c]) Moore *v.* Patton, 2 Port. 451; Parker *v.* Parker, 33 Ala. 459; Mix *v.* Miller, 57 Cal. 356; Ruckman *v.* Bergholz, 37 N. J. L. 437; Kennedy *v.* Barnwell, 7 Rich. 124.

([d]) Gammell *v.* Skinner, 2 Gall. 45; Amee *v.* Wilson, 22 Me. 116; Barnard *v.* Bartholomew, 22 Pick. 291; Pierce *v.* Charter Oak Life Ins. Co., 138 Mass. 151; Ruckman *v.* Bergholz, 37 N. J. L. 437; Robbins *v.* Carll, 93 N. Y. 656; Chase *v.* Union Stone Co., 11 Daly 107.

([e]) Moore *v.* Patton, 2 Port. 451; McFadden *v.* Crawford, 39 Cal. 662; Feeter *v.* Heath, 11 Wend. 477; McCollum *v.* Seward, 62 N. Y. 316; Case *v.* Osborn, 60 How. Pr. 187.

([f]) Black *v.* Reybold, 3 Harr. 528; Young *v.* Dickey, 63 Ind. 31; Rend *v.* Boord, 75 Ind. 307; Wills *v.* Brown, 3 N. J. L. 411.

§ 309. **Demand prevented by defendant's act.**—Where the defendant, by his acts, makes a demand impossible or useless, interest may be recovered from the date of such act. In Chemical Nat. Bank *v.* Bailey ([a]) the plaintiff had been a depositor in a bank of which the defendant was the receiver. On winding up the affairs of the bank, there proved to be sufficient assets to pay the depositors in full and leave a surplus. The question arose, whether the depositors should be allowed interest before dividing the surplus. Wallace, J., after saying that interest was allowed as a matter of right where there was a wrongful detention of a debt, said: "Ordinarily, an action cannot he maintained by a depositor against a bank, until a formal demand has been made; and, of course, no interest can be recovered except that arising after the demand. . . . . But if the bank, by words or conduct, denies the depositor's right to his balance, it becomes presently liable to an action, without formal demand, and interest would be recoverable as damages." In this case it was held that putting its assets in the hands of a receiver was a wrongful act as regards the depositors, and they were, therefore, entitled to interest.([b]) In a case where the defendant absented himself from the State, so that a demand could not be made upon him, it was held that interest might be recovered from the time the services were rendered.([c])

§ 310. **Simple running account.**—It has often been said that a running account does not bear interest, without an agreement or custom that it shall.([d]) Where there is

([a]) 12 Blatch. 480.

([b]) See also Jenkins *v.* Armour, 6 Biss. 312.

([c]) Graham *v.* Chrystal, 2 Keyes 21; S. C. 2 Abb. App. 263.

([d]) Selleck *v.* French, 1 Conn. 32; Day *v.* Lockwood, 24 Conn. 185; Crosby *v.* Mason, 32 Conn. 482; Harrison *v.* Handley, 1 Bibb 443; Hunt *v.* Nevers, 15 Pick. 500; Goff *v.* Rehoboth, 2 Cush. 475; Flannery *v.* Anderson, 4 Nev.

an open running account—for example, an account for domestic supplies—it is reasonable to suppose that it was the intention to allow credit ; the fact of a charge being in an account, in other words, shows that an indefinite credit was allowed. No interest should therefore be given, generally, until demand for payment ; or if there is no demand, until the date of the writ. This is in fact the rule now recognized. The courts no longer inquire whether the plaintiff's demand is in form an account ; many of the cases already cited allowing interest were claims brought on a simple account.([a])

Interest is sometimes allowed from the time the account is closed, that is, from the date of the last item.([b]) In Vermont, interest is allowed at the expiration of a year ; ([c]) but if the defendant was ignorant of an item of charge, interest does not run till demand.([d]) In Mississippi, by statute, the jury may allow interest on open accounts.([e]) And interest is often allowed upon accounts

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437 (by statute) ; Doyle *v.* St. James' Church, 7 Wend. 178 ; Kane *v.* Smith, 12 Johns. 156 ; Van Beuren *v.* Van Gaasbeck, 4 Cow. 496 ; Tucker *v.* Ives, 6 Cow. 193 ; Newell *v.* Griswold, 6 Johns. 45 ; Trotter *v.* Grant, 2 Wend. 413 ; Wood *v.* Hickok, 2 Wend. 501 ; Esterly *v.* Cole, 3 N. Y. 502 ; Henry *v.* Risk, 1 Dall. 265 ; Williams *v.* Craig, 1 Dall. 313 ; Graham *v.* Wiliams, 16 S. & R. 257; Knight *v.* Mitchell, 3 Brev. 506 ; Goddard *v.* Bulow. 1 N. & McC. 45 ; Conyers *v.* Magrath, 4 McC. 392 ; Farrand *v.* Bouchell, Harp. 83 ; Cloud *v.* Smith, 1 Tex. 102 ; Marsh *v.* Fraser, 37 Wis. 149 ; Shipman *v.* State, 44 Wis. 458 ; Martin *v.* State, 51 Wis. 407. But *contra*, Houghton *v.* Hagar, Brayt. (Vt.) 133.

([a]) *E. g.* Moore *v.* Patton, 2 Port. 451 ; Young *v.* Dickey, 63 Ind. 31 ; Rend *v.* Boord, 75 Ind. 307 ; Barnard *v.* Bartholomew, 22 Pick. 291 ; Wiltburger *v.* Randolph, Walk. (Miss.) 20 ; Blakely *v.* Jacobson, 9 Bosw. 140 ; Chase *v.* Union Stone Co., 11 Daly 107.

([b]) Leyde *v.* Martin, 16 Minn. 38 ; Dickenson *v.* Gould, 2 Tyler 32.

([c]) Wood *v.* Smith, 23 Vt. 706 ; Davis *v.* Smith, 48 Vt. 52.

([d]) Langdon *v.* Castleton, 30 Vt. 285.

([e]) Houston *v.* Crutcher, 31 Miss. 51 ; Thompson *v.* Matthews, 56 Miss. 368.

by statute, from a certain date, as from the date of the last item,[a] or six months after such date.[b]

§ 311. **Balance of a mutual account.**—Where there is a mutual account, a different principle governs. Until the account is gone over and balanced, there is usually no means of telling which party is the debtor and what the amount of the debt is. Consequently, as a general rule no interest can be recovered upon a mutual account until it is balanced,[c] and on this principle interest is generally disallowed as between partners, in accounts of the partnership.[d] It would seem that no interest should be recovered until the verdict, unless the defendant was in fault for not having the account sooner liquidated. It is, however, held in Massachusetts that interest may be recovered from the commencement of legal proceedings.[e] If, however, it became the defendant's duty to have the account adjusted on a certain day, and he failed to do so, interest on the balance found due will be allowed from that time. So where the defendant agreed that the account should be adjusted on a certain day;[f] and where the plaintiff, after a reasonable time made a demand for an accounting. So in Gleason *v.* Briggs[g] there had been mutual charges and credits. At one time the parties met to make a settlement, but none was effected. Redfield, C. J., said (p. 140):

"The interest seems to have been cast upon what the auditors

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[a] Col. Gen. St. § 1707; Bergundthal *v.* Bailey, 25 Pac. Rep. 86 (Col.).

[b] Neb. Comp. St. *c.* 44, § 4; Weston *v.* Brown, 46 N. W. Rep. 826 (Neb.).

[c] Clark *v.* Clark, 46 Conn. 586; Davis *v.* Walker, 18 Mich. 25; Raymond *v.* Isham, 8 Vt. 258.

[d] Dexter *v.* Arnold, 3 Mas. 284; Gage *v.* Parmelee, 87 Ill. 329; Gilman *v.* Vaughan, 44 Wis. 646.

[e] Stimpson *v.* Greene, 13 All. 326; Freeman *v.* Freeman, 142 Mass. 98.

[f] Scroggs *v.* Cunningham, 81 Ill. 110.

[g] 28 Vt. 135, 140.

found to be due to the plaintiff in 1836, at the time they met and attempted to settle, and which was fairly enough, perhaps, regarded as a demand or claim of payment upon both sides, for what should happen to be due. And if it had turned out that the plaintiff owed the defendant at that time a balance, it would seem just to give him interest, and that is what the auditors did for the plaintiff. The law will always imply a contract to pay interest upon a debt payable upon demand, after demand made, by way of damages for the delay. The cases upon this subject may not all be reconcilable, but this is almost the universal rule."

Where the account has been stated by the parties and a balance struck, it is payable at once, and interest runs from the accounting; ([a]) and where an account was rendered by the plaintiff showing a balance due, and was received and kept by the defendant without objection so long that it is found to have been acquiesced in, interest runs from the time the account was rendered.([b]) The cases on the subject of account seem to show that the question of whether interest is to be allowed, and the date from which it is to run, must be determined by all the circumstances of the case, including the usual course of dealing between the parties, and any custom applicable. There may be, for example, as in some stock brokers' accounts, a custom to charge or credit each entry on both sides of the account with interest.

§ 312. **Unliquidated demands.**—The classes of cases already examined are of a simple character. We have now to examine those in which the demand is unliquidated, and in which other tests have to be applied; finally ending our examination with torts, some of which, as al-

([a]) Blaney *v.* Hendricks, 2 W. Bl. 761; Young *v.* Godbe, 15 Wall. 562; Underhill *v.* Gaff, 48 Ill. 198; Haight *v.* McVeagh, 69 Ill. 624; Crosby *v.* Otis, 32 Me. 256; Walden *v.* Sherburne, 15 Johns. 409.

([b]) Bainbridge *v.* Wilcocks, Bald. 536; Case *v.* Hotchkiss, 3 Keyes 334; Porter *v.* Patterson, 15 Pa. 229.

ready explained, are of such a nature that interest is, by the nature of the case, excluded.

Where no price has been agreed upon for goods or services, and the plaintiff recovers on a *quantum meruit* or *quantum valebant*, we have an unliquidated demand; yet on the principle that has been stated this fact alone does not prevent the recovery of interest. Interest is given *from the time when the defendant should have paid the amount due*, and this explains the frequent disallowance of interest in cases of this kind, for it is not generally the duty of a party to pay money until the amount to be paid is ascertained. Consequently unless the amount due is or should be ascertained, the defendant is not in default. But there must be some time within which the account ought to be liquidated; otherwise the creditor must in every case sue, a result which the courts would not look on with favor.

§ 313. **New York rule.**—A rule has been established by the Court of Appeals of New York in the leading case of Van Rensselaer *v.* Jewett,[a] which covers a large class of cases; namely, those cases where the amount can be ascertained by computation, together with a reference to well-established market values. In such cases interest will be allowed. This rule was commented upon in the case of McMahon *v.* New York & E. R.R. Co.[b] The action was for work, labor, and services under a contract for building part of the defendants' road. The contract provided for three classes of work, and at certain periods the engineer of the company was to make estimates of the amount of each class of work done, and these estimates were to form the basis of payment. The engineer did not make the estimates, and the plaintiff brought suit on the contract. The referee allowed in-

[a] 2 N. Y. 135. [b] 20 N. Y. 463, 469.

terest on the amount found due by him, and to this an exception was taken. Selden, J., delivered the opinion of the court on this point, as follows :

"The old common-law rule which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been modified by general consent, so far as to hold that if the amount is capable of being ascertained by mere computation, then it shall carry interest ; and this court, in the case of Van Rensselaer *v.* Jewett, went a step further, and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market values ; because such values, in many cases, are so nearly certain, that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay. That case went, I think, as far as it is reasonable and proper to go in that direction. So long as the courts adhere even to the principles of that case, they are not without a rule which it is possible to apply. The rule itself is definite, and the only uncertainty which it introduces is that which necessarily attends the settling of market rates and prices. In the present case, the plaintiff's demand was neither liquidated, nor capable of being ascertained by computation merely ; nor could its amount be determined by any reference to ordinary market rates, and hence interest could not be recovered here, upon the principle adopted in the case of Van Rensselaer *v.* Jewett."[a]

In Sipperly *v.* Stewart [b] the plaintiff sued to recover the value of the use of a canal-boat. Miller, J., held that, on the principle of McMahon *v.* N. Y. & E. R.R. Co., interest should be allowed, as the value of the use could be ascertained by reference to market rates. It seems, however, that the rule cannot be extended to cover cases of mutual accounts. In Smith *v.* Velie [c] the plaintiff sued for services rendered as housekeeper. There had been payments on account, and Grover, J.,

[a] *Acc.* Mansfield *v.* New York C. & H. R. R.R. Co., 114 N. Y. 331.
[b] 50 Barb. 62.
[c] 60 N. Y. 106.

held that interest on the balance could not be allowed, as the case showed that the accounts were open and unliquidated. He then said that McMahon *v.* N. Y. & E. R.R. Co. was a direct authority against the allowance of interest. "There was no time fixed for payment. The case shows that there was no fixed market value by which the rate of wages could be determined. There was no default in the intestate or appellant in determining the balance due the claimant. Under such a state, the learned judge says, in the case cited, interest cannot be allowed." These last two cases are, we think, only distinguishable by the fact that the account in the latter was mutual, and not in the former. It is true that Grover, J., says, in the latter, that there was no market value for the services, and nothing is said on that point in the former. But the decision in the latter case was based on the ground that there was an open account between the parties, and the judge cites, in support of his decision, two cases—Holmes *v.* Rankin (a) and McKnight *v.* Dunlop (b)—both of which were cases of mutual accounts. Interest was disallowed in them on this ground, and in one of them, at least, the articles had a market value.

§ 314. **Time from which interest runs—Demand.**—In some cases it has been held that interest runs from the time the plaintiff demanded a settlement, *i. e.*, when the demand is reasonable and puts the defendant in default. Thus in Pennsylvania, in Gray *v.* Van Amringe,(c) the court held a demand sufficient to entitle the plaintiff to interest. The action was for services rendered. An account had been presented, but payment had been refused, on the ground that the charges were excessive. The plaintiff recovered the full amount demanded. In

(a) 17 Barb. 454. (b) 4 Barb. 36. (c) 2 W. & S. 128.

delivering the opinion of the court, Kennedy, J., said: "In a case, therefore, where the plaintiff has performed work, labor, and services of any kind, no matter what, at the special instance and request of the defendant, without any express agreement between them, fixing the prices or sums of money that shall be paid therefor, and after having performed the same, demands of the defendant what shall be deemed afterwards, by a court and jury, a reasonable compensation, which the latter refuses to pay, it would seem to be just that the plaintiff should recover interest on the amount so demanded, from the time of the demand."

A demand, not for an accounting and agreement on the amount due, but for a sum assumed by the plaintiff to be due, is sometimes said to be enough to put the defendant in default if the sum is a reasonable one. So where an attorney presents a bill for his services, the charges being found to have been reasonable, interest is allowed from the presentment of the bill.[a] This may be supported, upon the ground that it is really a proper demand for a settlement. A demand for the payment of an unreasonably large sum of money will certainly not put the defendant in default, so as to subject him to the payment of interest.[b]

In other cases, it has been held that interest is recoverable from the beginning of the suit;[c] while still others hold that interest can be allowed neither from demand nor from the beginning of the suit, but only from the

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[a] Adams *v.* Fort Plain Bank, 36 N. Y. 255; Mygatt *v.* Wilcox, 45 N. Y. 306; Hand *v.* Church, 39 Hun 303. But *contra*, People *v.* Supervisors, 9 Abb. N. S. 408.

[b] Goff *v.* Rehoboth, 2 Cush. 475; Shipman *v.* State, 44 Wis. 458.

[c] Goddard *v.* Foster, 17 Wall. 123; Mercer *v.* Vose, 67 N. Y. 56; Hand *v.* Church, 39 Hun 303; Gammon *v.* Abrams, 53 Wis. 323; Tucker *v.* Grover, 60 Wis. 240.

verdict, since the defendant did not know before that how much he must pay.[a] It is well said in New York that if a demand will not set interest running, the bringing of a suit should not.[b]

Where by the contract it was the defendant's duty at a certain time to liquidate the debt, and he fails to do so, interest can without doubt be recovered on the balance found due from that time.[c] Such a consideration seems to have governed the court in Robinson *v.* Stewart.[d] The action was to set aside certain conveyances made to the defendant by his father, in fraud of the latter's creditors. The father had been indebted to the defendant on an account for services rendered, and conveyed the property to him nominally in payment. The property, however, greatly exceeded the services in value. The defendant claimed, as set-off, the value of his services, with interest. Denio, J., said: "The demand being wholly unliquidated, interest should not have been allowed prior to the conveyances. The deceased attempted to pay this debt by the conveyances, by means of the property conveyed on the 15th of January, 1842. From that time, I think, the defendant was entitled to interest." But if no demand is made for settlement or claim presented by the plaintiff, the defendant is not in default, and interest cannot be recovered.[e] In Newel *v.* Keith,[f] an action against an administrator for ser-

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[a] Cox *v.* McLaughlin, 76 Cal. 60; Murray *v.* Ware, 1 Bibb 325; McKnight *v.* Dunlop, 4 Barb. 36; Pursell *v.* Fry, 19 Hun 595; Day *v.* N. Y. C. R.R. Co., 22 Hun 412; Martin *v.* State, 51 Wis. 407.

[b] White *v.* Miller, 78 N. Y. 393; McMaster *v.* State, 108 N. Y. 542.

[c] Moore *v.* Patton, 2 Port. 451; McMahon *v.* New York & E. R.R. Co., 20 N. Y. 463; Ansley *v.* Peters, 1 All. (N. B.) 339.

[d] 10 N. Y. 189, 197.

[e] Adams Exp. Co. *v.* Milton, 11 Bush. 49; Gallup *v.* Perue, 10 Hun 525; People *v.* Supervisors, 9 Abb. N. S. 408; Marsh *v.* Fraser, 37 Wis. 149.

[f] 11 Vt. 214.

vices rendered the intestate, it was said: "Inasmuch as, from aught that appears, the delay of payment in the lifetime of Mrs. Keith proceeded from the voluntary act of the plaintiff, and the claim was permitted to lie dormant for such a length of time, we think it unreasonable that interest should be added to this amount so long as the delay was the fault of the plaintiff."

Where the defendant claims and succeeds in reducing the amount of damages by recoupment, or other abatement, we have a case of *quantum meruit* on both sides, analogous to a mutual account out of court. The cases generally allow no interest before verdict.[a] It would seem, however, that it may in such cases be a question of the time when the balance is payable; and that the court should allow interest from that time. Nor is it easy to see how it can be held that the balance is not payable at least as early as the beginning of the suit.[b]

§ 315. **General conclusion.**—The subject is without doubt a difficult one, and the decisions, as have been seen, are not harmonious. But by keeping in mind the fundamental principle much of the difficulty may be avoided. As soon as it is the legal duty of the defendant to pay, he is liable for interest. As the defendant must have been in default before the action is brought, if the plaintiff recovers, and as his default consisted in withholding money due, he should, it seems, get interest at least from the date of the writ. There seems to be good reason for going further, and holding him to be in default from a demand by the plaintiff for an accounting (made after a reasonable time) and a refusal to account. From that

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[a] The Isaac Newton, 1 Abb. Adm. 588; Brady *v.* Wilcoxson, 44 Cal. 239; Still v. Hall, 20 Wend. 51; McMaster *v.* State, 108 N. Y. 542.

[b] In Massachusetts, interest is allowed on the balance recovered from the date of the writ. Palmer *v.* Stockwell, 9 Gray 237.

time the defendant cannot claim any right to withhold whatever balance was in fact due, and would have been found due if he had acceded to the plaintiff's demand; before that, the plaintiff cannot claim any right to payment. Where interest is refused in actions of contract on the ground that the claim is unliquidated, it is in fact usually allowed from the date of the writ.[a]

§ 316. Value of property destroyed or converted.—Where property is destroyed, or is converted, so that the title either is, or is regarded as, out of the former owner, damages are the pecuniary representative of the property, and take its place. The plaintiff has lost or abandoned his claim to the *property;* his claim against the defendant is for an equivalent sum of *money.* In this point of view, a conversion very nearly resembles a sale. In this case, compensation for being kept from what rightfully belongs to the plaintiff is not compensation for being kept out of the use of property (the value of its use), but for being kept out of the use of money (interest). In actions of trover, therefore, the plaintiff recovers the value of the property, with interest from the time of conversion;[b] which in a case of conversion by demand

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[a] McCollum *v.* Seward, 62 N. Y. 316; Mercer *v.* Vose, 67 N. Y. 56; Tucker *v.* Grover, 60 Wis. 240; Hewitt *v.* John Week Lumber Co, 46 N. W. Rep. 822 (Wis.).

[b] Ekins *v.* East India Co., 1 P. Wms. 395; Hamer *v.* Hathaway, 33 Cal. 117; Clark *v.* Whitaker, 19 Conn. 320; Tuller *v.* Carter, 59 Ga. 395; Sanders *v.* Vance, 7 T. B. Mon. 209; New Orleans D. Co. *v.* De Lizardi, 2 La. Ann. 281; Hayden *v.* Bartlett, 35 Me. 203; Moody *v.* Whitney, 38 Me. 174; Robinson *v.* Barrows, 48 Me. 186; Hepburn *v.* Sewell, 5 H. & J. 211; Thomas *v.* Sternheimer, 29 Md. 268; Maury *v.* Coyle, 34 Md. 235; Kennedy *v.* Whitwell, 4 Pick. 466; Negus *v.* Simpson, 99 Mass. 388; Winchester *v.* Craig, 33 Mich. 205; Chauncey *v.* Yeaton, 1 N. H. 151; Hyde *v.* Stone, 7 Wend. 354; Baker *v.* Wheeler, 8 Wend. 505; Stevens *v* Low, 2 Hill 132; Andrews *v.* Durant, 18 N. Y. 496; McDonald *v.* North, 47 Barb. 530; Pease *v.* Smith, 5 Lans. 519; Wehle *v.* Butler, 43 How. Pr. 5; Commercial Bank *v.* Jones, 18 Tex. 811; Gillies *v.* Wofford, 26 Tex. 76; Willis

and refusal is of course the time of demand.[a] And in any action for destroying or carrying off property, the plaintiff recovers interest from the time of the wrongful act.[b] So in an action against a common carrier for the loss of goods, interest is allowed on their value ;[c] and in an action of trespass for removing material from land, the owner may recover interest on the value of the material removed.[d]

In Parrott *v.* The Knickerbocker Ice Co.[e] the plaintiff's boat had been lost by collision with the defendant's boat. Rapallo, J., said: "In cases of trover, replevin, and trespass, interest on the value of property unlawfully taken or converted is allowed by way of damages, for the purpose of complete indemnity of the

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v. McNatt, 75 Tex. 69; Rhemke *v.* Clinton, 2 Utah, 230; Grant *v.* King, 14 Vt. 367; Thrall *v.* Lathrop, 30 Vt. 307; Shepherd *v.* McQuilkin, 2 W. Va. 90; Bigelow *v.* Doolittle, 36 Wis. 115. *Contra*, Palmer *v.* Murray, 8 Mont. 312. Interest in discretion of the jury: Stephens *v.* Koonce, 103 N. C. 266.

[a] Garrard *v.* Dawson, 49 Ga. 434; Northern T. Co. *v.* Sellick, 52 Ill. 249; Johnson *v.* Sumner, 1 Met. 172; Schwerin *v.* McKie, 51 N. Y. 180.

[b] Fail *v.* Presley, 50 Ala. 342; Oviatt *v.* Pond, 29 Conn. 479; Brown *v.* Southwestern R.R. Co., 36 Ga. 377; Bradley *v.* Geiselman, 22 Ill. 494; Johnson *v.* Chicago & N. W. Ry. Co., 77 Ia. 666; Buffalo & H. T. Co. *v.* Buffalo, 58 N.Y. 639; Mairs *v.* Manhattan R. E. Assoc., 89 N. Y. 498; Allegheny *v.* Campbell, 107 Pa. 530; Texas & P. Ry. Co. *v.* Tankersley, 63 Tex. 57. But *contra*, Green *v.* Garcia, 3 La. Ann. 702, on the ground that the amount is unliquidated.

[c] Woodward *v.* Illinois C. R.R. Co., 1 Biss. 403; Fraloff *v.* New York C. & H. R. R.R. Co., 10 Blatch. 16; The Gold Hunter, 1 Blatch. & H. 300; Parrott *v.* Housatonic R.R. Co., 47 Conn. 575; Mote *v.* Chicago & N. W. R.R. Co., 27 Ia. 22; Robinson *v.* Merchants' D. T. Co., 45 Ia. 470; Cowley *v.* Davidson, 13 Minn. 92; McCormick *v.* Pennsylvania C. R.R. Co., 49 N. Y. 303; Duryea *v.* Mayor, 26 Hun 120; Erie Ry. Co. *v.* Lockwood, 28 Oh. St. 358; Newell *v.* Smith, 49 Vt. 255; Whitney *v.* Chicago & N. W. Ry. Co., 27 Wis. 327. But *contra*, De Steiger *v.* Hannibal & St. J. Ry. Co., 73 Mo. 33; Fowler *v.* Davenport, 21 Tex. 626.

[d] Pittsburgh, F. W. & C. Ry. Co. *v.* Swinney, 97 Ind. 586.

[e] 46 N. Y. 361, 369.

party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another, may not be included in the damages."

In an action brought against a municipality on a statute, for destruction of the plaintiff's property by a mob, it is held in New York that interest may be recovered,(a) at least in the discretion of the jury; (b) in Pennsylvania, that interest may not be recovered.(c) In an action of replevin, where the prevailing party does not succeed in securing the property, but recovers its value, he may also recover interest from the time it was taken from him.(d) But both damages for detention and interest on the value cannot be recovered.(e)

§ 317. **Property destroyed by negligence.**—There seems to be no reason why any difference should exist in the rules governing the allowance of interest, on the value of property destroyed, whether the destruction was caused by the misfeasance or by the negligence of the defendant,(f) that is, whether the suit is such that at common law an action would have lain, on the one hand of trover, trespass, replevin, or detinue; on the other, of trespass on the case. In some jurisdictions interest is in fact allowed in cases of negligence; (g) but in others interest

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(a) Greer *v.* Mayor, 3 Robt. 406.

(b) Orr *v.* Mayor, 64 Barb. 106.

(c) Weir *v.* Allegheny, 95 Pa. 413.

(d) Yelton *v.* Slinkard, 85 Ind. 190; Blackie *v.* Cooney, 8 Nev. 41; Brizsee *v.* Maybee, 21 Wend. 144; McDonald *v.* Scaife, 11 Pa. 381; Bigelow *v.* Doolittle, 36 Wis. 115.

(e) McCarty *v.* Quimby, 12 Kas. 494.

(f) Parrott *v.* Knickerbocker Ice Co., 46 N. Y. 361, *per* Rapallo, J.

(g) Alabama G. S. R.R. Co. *v.* McAlpine, 75 Ala. 113; Arthur *v.* Chicago, R. I. & P. Ry. Co., 61 Ia. 648; Varco *v.* Chicago, M. & S. P. Ry. Co., 30 Minn. 18; Chapman *v.* Chicago & N. W. Ry. Co., 26 Wis. 295; Dean *v.* Chicago & N. W. Ry. Co., 43 Wis. 305.

in such cases is held to be in the discretion of the jury.([a])

§ 318. **Property taken by eminent domain.**—Where land is taken by right of eminent domain, the owner recovers interest on the value of the land from the time of taking.([b]) In Old Colony R.R. Co. *v.* Miller ([c]) the plaintiff brought an action to have his damages assessed for land taken by the company. Colt, J., said: "If not agreed on, the damages are assessed by a jury, on the application of either party; but they are assessed as of the time of the location, and the jury may properly allow interest upon the amount ascertained as damages, for the detention of the money from the time of taking." He then quotes the language of Chief-Justice Shaw, in Parks *v.* Boston,([d]) to the effect that taking the land is equivalent to a purchase, and the delay in payment must be compensated by interest. To the same effect is Delaware,

([a]) Western & A. Ry. Co. *v.* McCauley, 68 Ga. 818 (*semble*); Chicago & N. W. Ry. Co. *v.* Shultz, 55 Ill. 421; Frazer *v.* Bigelow Carpet Co., 141 Mass. 126 (*semble*); Home Ins. Co. *v.* Pennsylvania R.R. Co., 11 Hun 182. In Lucas *v.* Wattles, 49 Mich. 380, it was said to be in the discretion of the jury in such a case to allow interest from the date of the writ. A few decisions, which cannot, however, be considered of more than local authority, refuse the allowance of interest even in the discretion of the jury, either absolutely, as in Houston & T. C. R.R. Co. *v.* Muldrow, 54 Tex. 233, or in the absence of circumstances of aggravation, as in Toledo, P. & W. Ry. Co. *v.* Johnston, 74 Ill. 83.

([b]) Hayes *v.* Chicago, M. & S. P. Ry. Co., 64 Ia. 753; Hartshorn *v.* Burlington, C. R. & N. R.R. Co., 52 Ia. 613; Cohen *v.* St. Louis, F. S. & W. R.R. Co., 34 Kas. 158; Bangor & P. R.R. Co. *v.* McComb, 60 Me. 290; Reed *v.* Hanover B. R.R. Co., 105 Mass. 303; Kidder *v.* Oxford, 116 Mass. 165; Chandler *v.* Jamaica P. A. Co., 125 Mass. 544; Sioux C. R.R. Co. *v.* Brown, 13 Neb. 317; North H. C. R.R. Co. *v.* Booraem, 28 N. J. Eq. 450; Atlantic and G. W. Ry. Co. *v.* Koblentz, 21 Oh. St. 334; Alloway *v.* Nashville, 88 Tenn. 510; Velte *v.* United States, 76 Wis. 278. But *contra*, Himmelman *v.* Oliver, 34 Cal. 246; Haskell *v.* Bartlett, 34 Cal. 281 (statutory).

([c]) 125 Mass. 1.

([d]) 15 Pick. 198.

L. & W. R.R. Co. *v.* Burson,[a] where Thompson, C. J., said :

"Nor was there error in charging the jury to allow interest. If the plaintiff was entitled to compensation by reason of her property being taken at a particular time, she was certainly entitled to interest as a compensation for its wrongful detention. The company, as well as the plaintiff, could have had the damages assessed as soon as they pleased after locating the road, and it was no reason for withholding compensation that its amount was unknown or unascertained. As the company was the party to pay, it ought to have had the amount ascertained, and paid it (8 Harris, 240); failing to do so, it has no right to complain at having to meet an incident of the delay in the shape of interest."

But interest runs only from the time when possession is taken ; and therefore if the award is made before the land is actually taken, interest cannot be included in the award.[b] In some States the owner, after the notice of taking has been filed, has a right to give up his land and demand compensation. Where such a rule prevails, interest may be recovered from the time of the demand.[c] Where the defendant, a corporation, to save an injunction against obstructing the plaintiff's way, paid damages into court *pendente lite* and continued the obstruction, it was held it must pay interest from the time the damages were paid into court till final decree.[d] In New Jersey, by statute, interest runs from the date of the assessment.[e]

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[a] 61 Pa. 369, 380.

[b] Chicago *v.* Barbian, 80 Ill. 482 ; South Park Comm'rs *v.* Dunlevy, 91 Ill. 49 ; Gay *v.* Gardiner, 54 Me. 477 ; Fiske *v.* Chesterfield, 14 N. H. 240 ; Metler *v.* Easton & A. R.R. Co., 37 N. J. L. 223 ; Stewart *v.* Philadelphia County, 2 Pa. St. 340 ; Second St., Harrisburg, 66 Pa. 132.

[c] Clough *v.* Unity, 18 N. H. 75 ; People *v.* Canal Comm'rs, 5 Denio 401.

[d] Carpenter *v.* Easton & A. R.R. Co., 28 N. J. Eq. 390.

[e] Beebe *v.* Newark, 24 N. J. L. 47. The same rule was adopted in Beveridge *v.* Park Comm'rs, 100 Ill. 75.

§ 319. **Failure to deliver goods.**—Where property is paid for in advance and the seller fails to deliver it, the purchaser recovers interest on the value from the time it should have been delivered.(a) And so in case of any failure to deliver property. Thus in a case already cited, where the rent was payable in wheat and services, the Court of Appeals of New York held this language :[1]

"Whenever a debtor is in default for not paying money, delivering property, or rendering services, in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him ; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the court for redress, he ought in all such cases to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services ; but the value can be ascertained, and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money."(b)

So in McKenney *v.* Haines (c) the plaintiff sued for breach of contract to return borrowed stock on demand. It was held that he could recover interest on the

[1] Van Rensselaer *v.* Jewett, 5 Denio 135 ; 2 N. Y. 135, overruling Van Rensselaer *v.* Platner, 1 Johns. 276. See, also, an able opinion of Willard, J., in Van Rensselaer *v.* Jones, 2 Barb. 643, where the whole subject is examined, and a note to Lattin *v.* Davis, Hill and Denio Suppl. 9.

(a) Pujol *v.* McKinlay, 42 Cal. 559; Bickell *v.* Colton, 41 Miss. 368; Bicknall *v.* Waterman, 5 R. I. 43; Merryman *v.* Criddle, 4 Munf. 542 ; Enders *v.* Board of Public Works, 1 Gratt. 364, 390. But *contra*, Dobenspeck *v.* Armel, 11 Ind. 31. In Stark *v.* Price, 5 Dana 140, interest in such a case was said to be in the discretion of the jury.

(b) *Acc.* Livingston *v.* Miller, 11 N. Y. 80.

(c) 63 Me. 74.

value at the time of demand.[a] So in Canton *v.* Smith,[b] where the plaintiff had given bonds to the defendant, under an agreement to complete a railroad or return the bonds, it was held "clearly correct" to charge the jury that interest should be allowed on the value of the bonds.

When property sold and not delivered has not been paid for, interest is allowed on the difference between the contract and market price.[c] In Dana *v.* Fiedler,[d] Johnson, J., said:

"Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled, on the day of performance, to the property agreed to be delivered; if it is not delivered the law gives as the measure of compensation then due the difference between the contract and market prices. If he is not also entitled to interest from that time as matter of law, this contradictory result follows, that, while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount, that the longer a party is delayed in obtaining it, the greater shall its inadequacy become."

§ 320. **Interest in actions of tort.**—It sufficiently appears from what has been already said that there is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that

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[a] See also Savannah & C. R.R. Co. *v.* Callahan, 56 Ga. 331.

[b] 65 Me. 203.

[c] Cease *v.* Cockle, 76 Ill. 484; Driggers *v.* Bell, 94 Ill. 223; Thomas v. Wells, 140 Mass. 517; Clark *v.* Dales, 20 Barb. 42; Hamilton *v.* Ganyard, 34 Barb. 204; Fishell *v.* Winans, 38 Barb. 228; Currie *v.* White, 6 Abb. N. S. 352, 385.

[d] 12 N. Y. 40.

we find the clearest cases for the disallowance of interest.

There are many actions of tort which are not brought to recover a sum of money representing a property loss of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions.[a] It is certainly not allowed in such actions as assault and battery,[b] or for personal injury by negligence,[c] libel, slander, seduction, false imprisonment. But where the tort is of a sort to deprive the plaintiff of property, though not (as in the case of conversion) taking away his title to any specific thing, interest is frequently, and perhaps generally, allowed. Thus, where the value of property is diminished by an injury wrongfully inflicted, it has been held that the jury may give interest on the amount by which the value was diminished from the time of the injury.[d] So interest has been allowed on the money spent in repairing property injured,[e] or in repurchasing property wrongfully taken and sold by the defendant.[f] In an action against a carrier for delay in the delivery of goods, interest was allowed on the amount found due at the time they were delivered.[g] In an action for false representations, by which the defendant obtained money from the plaintiff, interest on the money is allowed.[h] So where the defendant, by his refusal to perform an official

[a] Plymouth *v.* Graver, 125 Pa. 24; Emerson *v.* Schoonmaker, 135 Pa. 437.

[b] Ratteree *v.* Chapman, 79 Ga. 574; Pittsburgh S. Ry. Co. *v.* Taylor, 104 Pa. 306.

[c] Western & A. R.R. Co. *v.* Young, 81 Ga. 397.

[d] Gillett *v.* Western R.R. Co., 8 All. 560; Walrath *v.* Redfield, 18 N. Y. 457. But in Black *v.* Camden & A. R.R. & Tr. Co., 45 Barb. 40, interest in such a case was said to be in the discretion of the jury.

[e] Whitehall T. Co. *v.* New Jersey S. B. Co., 51 N. Y., 369.

[f] Dodson *v.* Cooper, 37 Kas. 346; McInroy *v.* Dyer, 47 Pa. 118.

[g] Houston & T. C. Ry. Co. *v.* Jackson, 62 Tex. 209; Newell *v.* Smith, 49 Vt. 255.

[h] Arthur *v.* Wheeler & W. M. Co., 12 Mo. App. 335.

duty, prevented the plaintiff from recovering money due him, the plaintiff was entitled to interest on the money from the time he should have had it.[a] So where the principal's property is, by the misconduct or negligence of the agent, disposed of for less than its value, the agent is liable for interest on the balance that he should have procured for his principal.[b] In an action for waste, it was held that interest could be recovered from the date of the writ, there having been no demand for payment.[c]

So, in actions for breach of warranty of an article sold, which though in form contract, closely resemble actions for false representations, interest is allowed upon the difference between what the article is actually worth, and what it would have been worth had it been as represented.[d] Stoudenmeier *v.* Williamson [e] was an action for breach of warranty of a slave. The court said: "We hold that, in this State, whenever one party has a legal right to recover of another a debt or damages as due at a particular time, he is also entitled to interest as an incident, from the maturity of the demand until the trial." In an action for breach of warranty of title of a slave, where the seller had a life interest only, it was held that interest on the value of the slave could be recovered from the time the use of the slave was lost; that is, from the death of the seller.[f] So, in an action for breach of

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[a] Clark *v.* Miller, 54 N. Y. 528.

[b] Greenfield Savings Bank *v.* Simons, 133 Mass. 415; Milbank *v.* Dennistoun, 1 Bosw. 246.

[c] Dawes *v.* Winship, 5 Pick. 97 n.

[d] Kornegay *v.* White, 10 Ala. 255; Marshall *v.* Wood, 16 Ala. 806; Rowland *v.* Shelton, 25 Ala. 217; Buford *v.* Gould, 35 Ala. 265; Tatum *v.* Mohr, 21 Ark. 349; McKay *v.* Lane, 5 Fla. 268; Badgett *v.* Broughton, 1 Ga. 591; Pitsinowsky *v.* Beardsley, 37 Ia. 9; Briggs *v.* Brushaber, 43 Mich. 330; Snow *v.* Nowlin, 43 Mich. 383; Ancrum *v.* Slone, 2 Speer (S. C.) 594.

[e] 29 Ala. 558, 569.

[f] Crittenden *v.* Posey, 1 Head 311.

warranty of title to land, the plaintiff may recover interest on the purchase-money recovered.[a] By these decisions earlier cases holding that interest could not be allowed be cause the claims were unliquidated are overruled.[b]

§ 321. **Discretion of jury still exists in some cases.**—The jury is still allowed in its discretion to give damages in the nature of interest in some actions of tort, where until recently interest could not have been added in any case.[c] It is sometimes said that though the jury cannot award interest in ordinary cases of tort *eo nomine*, yet it may consider the lapse of time since the injury in estimating the damages.[d] Even in actions of contract for delay in delivery of property, it has been held that the jury may adopt an amount equal to interest on the value of the property, as a fair compensation for loss of use of the property.[e]

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[a] Stark *v.* Olney, 3 Ore. 88.

[b] Gilpins *v.* Consequa, Pet. C. C. 85; Philips *v.* Williams, 5 Gratt. 259. But in White *v.* Miller, 71 N. Y. 118, the decision was based on the New York rule as to unliquidated damages. The action was for breach of warranty of cabbage seed. The measure of damages was held to be the difference in value between the crop produced and that which would have been produced had the seed been of the quality represented. On this sum the court overruling the decision of the referee, refused to allow interest, on the ground that the damages were unliquidated and could not be estimated by computation or by reference to market values. The point was not fully considered, as there was another ground for reversing the decision; but the decision comes within the reason of the rule, as stated in McMahon *v.* N. Y. & Erie R.R. Co. The reason there stated is, that *the debtor* can, by reference to the market values, ascertain the amount due. But in White *v.* Miller, the crop which would have been produced would first have to be ascertained, and this would depend upon conditions of soil and weather, about which the defendant could know nothing.

[c] Central R.R. Co. *v.* Sears, 66 Ga. 499 (action for death of husband); Duryee *v.* New York, 96 N. Y. 477; Lawrence R.R. Co. *v.* Cobb, 35 Oh. St. 94 (trespass on real estate); Bare *v.* Hoffman, 79 Pa. 71 (diverting water).

[d] Clement *v.* Spear, 56 Vt. 401.

[e] Grosvenor *v.* Ellis, 44 Mich. 452; Hinckley *v.* Beckwith, 13 Wis. 31.

These last cases seem to show a tendency toward the allowance of interest as compensation for delay in settling a claim, except where such delay is paid for in some other way, as by compensation for use: in other words, a rule analogous to that allowing profits in proper cases. Such a rule would clearly bring the law much nearer to completeness of compensation.

§ 322. **The rule in Pennsylvania.**—In an action for the destruction of property by the defendant's negligence, where interest was claimed on the value of the property, the Supreme Court of Pennsylvania has recently said :([a])

"Interest as such is recoverable only where there is a failure to pay a liquidated sum due at a fixed day, and the debtor is in absolute default. It cannot, therefore, be recovered in actions of tort, or in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not, therefore, of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort, and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value, or other definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure. . . . . Interest is recoverable as of right, but *compensation for deferred payment in torts* depends on the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified

([a]) Richards *v.* Citizens N. Gas Co., 130 Pa. 37, 39, *per* Mitchell, J.

the defendant in refusing to pay, or in other ways the delay may be plaintiff's fault ; or, the liability of defendant may have arisen without fault."([a])

§ 323. **In Massachusetts.**—In Massachusetts interest upon the value of property has always been allowed in actions of trover ; but the allowance of such interest in other actions of tort was first discussed by the court in Frazer *v.* Bigelow Carpet Co.,([b]) where the trial judge, sitting in place of a jury, had allowed interest. The Supreme Court said :

"It is allowed as of right in trover and other like actions ; and although it is suggested that, in such cases, the defendant may be presumed to have had the use of the goods since the conversion, this is not necessarily the fact, and, if it were, would have no bearing on the indemnity due the plaintiff. . . . . *We will assume* that the sum ultimately found by the jury cannot be said to have been wrongfully detained before the finding, in such a sense that interest is due *eo nominee.* But we have heard no reason suggested why, if a plaintiff has been prevented from having his damages ascertained, and, in that sense, has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury in their discretion, and as incident to determining the amount of the original loss, may not consider the delay caused by the defendant. In our opinion they may do so ; and, if they do, we do not see how they can do it more justly than by taking interest on the original damage as a measure."

This case leaves the question of the allowance of interest as a matter of right in this class of cases still undetermined in Massachusetts.

§ 324. **In the Supreme Court of the United States.**—In the case of Lincoln *v.* Claflin,([c]) an action to recover the value of goods obtained by fraud, the appellant contended

([a]) *Acc.* Plymouth *v.* Graver, 125 Pa. 24 ; Emerson *v.* Schoonmaker, 135 Pa. 437.

([b]) 141 Mass. 126, *per* Holmes, J.

([c]) 7 Wall. 132, 139.

that interest upon the value had been wrongly allowed. The Supreme Court of the United States held that the question was not properly brought before them, and refused to reverse the judgment below. Field, J., however, said: "Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury."(a) Nothwithstanding this, the court has held that, in an action against a carrier for failure to deliver goods, interest may be recovered upon the value of the goods.(b) And the rule in the United States courts seems to be the same as that laid down in Massachusetts, except that it has been more strongly intimated in the former jurisdiction that interest in ordinary cases of tort is entirely within the discretion of the jury.

§ 325. **Interest on overdue paper—Contract and statute rate.**—As we have seen, interest is always recoverable on mercantile securities. Where interest is payable by the terms of such a contract, it is recoverable, not as damages for detention of money, but under the contract. After the contract matures, if the amount secured by the contract is unpaid a further question arises, on which there is great conflict of authority. It is claimed on the one side that interest continues to accrue by the terms of the contract, and at the stipulated rate; on the other side it is urged that the contract calls for payment at maturity; if it is broken then, the only right that remains is a claim for damages; and any further interest will be given, not in accordance with, but as damages for breach of the contract, and at the statutory rate.

(a) *Acc.* The Scotland, 118 U. S. 507.
(b) Mobile & M. Ry. Co. *v.* Jurey, 111 U. S. 584.

The decision must rest on the question, whether there is in such cases an implied agreement to pay the contract rate after maturity, or whether interest after maturity is to be given as damages for the delay. In First Ecclesiastical Society *v.* Loomis,(a) the action was on a note payable three years from date, with interest at $7\frac{3}{10}$ per cent. per annum, the statutory rate being 6 per cent. The court allowed interest after maturity at 6 per cent. only. In Seymour *v.* Continental Ins. Co.(b) this last case was referred to and approved. The action was on a demand note, with interest at 8 per cent., payable semi-annually. After referring to Hubbard *v.* Callahan,(c) where the note had provided for interest at 15 per cent. after maturity, and the court had allowed this rate, and to First Ecclesiastical Society *v.* Loomis, Carpenter, J., said that the contract must be enforced according to the intention of the parties. That the note was due immediately, but it was manifest from all the circumstances of the transaction that the parties intended to make a loan for a term of years and have the note stand as a continuing security, and hence the stipulated interest should be given. In Eaton *v.* Boissonnault (d) the action was on a promissory note, payable one year from date, with interest at 8 per cent., payable annually. It was held that after maturity the note only bore 6 per cent., the statutory rate. This case was affirmed in Paine *v.* Caswell,(e) where the action was on a note for $500, with 10 per cent. interest. No time for payment was fixed. Peters, J., said that it was the intention of the parties to make a continuing security, and interest should therefore run at the contract rate. In the course of his opinion, however, he said: "Where a note is payable on time

(a) 42 Conn. 570. (b) 44 Conn. 300. (c) 42 Conn. 524.
(d) 67 Me. 540. (e) 68 Me. 80.

with interest exceeding six per cent., no more than six per cent. is recoverable after maturity, there being no bargain for interest after that time. In such case interest after the note is due is allowed only by way of damages." The same general rule was followed in Kentucky, in Rilling *v.* Thompson,(a) where the plaintiff sued on a promissory note payable one year after date, with interest semi-annually at 10 per cent. Cofer, J., said: "If the right to interest depended alone upon the contract, and was not given by law, the appellee would not be entitled to any interest after the maturity of the note, and could only recover, if at all, by way of damages for withholding the money due." So, also, in Minnesota, in Moreland *v.* Lawrence,(b) where Berry, J., said: "The notes involved in this action drew interest from date at 5 per cent. per annum, but contained no stipulation as to interest after maturity. Under such circumstances it was proper to allow interest by way of damages, at the rate of 7 per cent., after the maturity of the notes." The rule is upheld in many jurisdictions.(c)

(a) 12 Bush. 310. (b) 23 Minn. 84.

(c) The following list will show that courts of the highest authority generally allow the statutory rate: *England:* Cook *v.* Fowler, L. R. 7 H. L. 27; Goodchap *v.* Roberts, 14 Ch. Div. 49; *contra,* Keene *v.* Keene, 3 C. B. (N. S.) 144. *Arkansas:* Gardner *v.* Barnett, 36 Ark. 476; Pettigrew *v.* Summers, 32 Ark. 571; Newton *v.* Kennerly, 31 Ark. 626; Woodruff *v.* Webb, 32 Ark. 612. *California:* Kohler *v.* Smith, 2 Cal. 597; Cummings *v.* Howard, 63 Cal. 503. *Connecticut:* First Ecclesiastical Society *v.* Loomis, 42 Conn. 570, explaining but practically overruling Adams *v.* Way, 33 Conn. 419. *Florida:* Jefferson County *v.* Lewis, 20 Fla. 980. *Kansas:* Robinson *v.* Kinney, 2 Kas. 184; Searle *v.* Adams, 3 Kas. 515. *Kentucky:* Rilling *v.* Thompson, 12 Bush 310. *Maine:* Duran *v.* Ayer, 67 Me. 145; Eaton *v.* Boissonnault, 67 Me. 540. *Maryland:* Brown *v.* Hardcastle, 63 Md. 484. *Minnesota:* Talcott *v.* Marston, 3 Minn. 339; Daniels *v.* Ward, 4 Minn. 168; Chapin *v.* Murphy, 5 Minn. 474; Moreland *v.* Lawrence, 23 Minn. 84. *Nevada:* McLane *v.* Abrams, 2 Nev. 199. *New Hampshire:* Ashuelot R.R. Co. *v.* Elliott, 57 N. H. 397. *New York:* Macomber *v.* Dunham, 8 Wend. 550; U. S. Bank *v.* Chapin, 9 Wend. 471; Hamilton *v.* Van Rensselear, 43 N. Y. 244;

§ 326. **Conflict of authority.**—But a number of courts insist that there is an implied contract to pay the stipulated rate after maturity.(a) In Cecil *v.* Hicks (b) the question was considered at some length. This action was on a promissory note payable in six months after date, with interest at 12 per cent. per annum from date. The statute rate was 6 per cent. After citing several decisions of the Virginia courts, that interest is an incident of the debt, due by contract in the absence of an express stipulation to the contrary, Moncure, P., said (p. 6).

"We think their contract ought to be construed precisely as if the words 'till paid' had been inserted therein after the words 'from date,' and that such was their obvious meaning. They no doubt omitted the words 'till paid' because they considered it only necessary to agree on some legal rate of interest and the date from which it should commence, believing that it would, of

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Southern C. R.R. Co. *v.* Moravia, 61 Barb. 180; but *contra*, Miller *v.* Burroughs, 4 Johns. Ch. 436; Andrews *v.* Keeler, 19 Hun 87; Genet *v.* Kissam, 53 N. Y. Super. Ct. 43. *Penna.:* Ludwick *v.* Huntzinger, 5 W. & S. 51. *Rhode Island:* Pearce *v.* Hennessy, 10 R. I. 223. *South Carolina:* Langston *v.* South C. R.R. Co., 2 S. C. 248; Briggs *v.* Winsmith, 10 S. C. 133; Maner *v.* Wilson, 16 S. C. 469; Thatcher *v.* Massey, 20 S. C. 542. *Utah:* Perry *v.* Taylor, 1 Utah 63.

(a) *Illinois:* Phinney *v.* Baldwin, 16 Ill. 108; Etnyre *v.* McDaniel, 28 Ill. 201. *Indiana:* Shaw *v.* Rigby, 84 Ind. 375; Kimmell *v.* Burns, 84 Ind. 370; Kerr *v.* Haverstick, 94 Ind. 178. *Iowa:* Hand *v.* Armstrong 18 Ia. 324; Thompson *v.* Pickel, 20 Ia. 490. *Massachusetts:* Brannon *v.* Hursell, 112 Mass. 63; Union Institution *v.* Boston, 129 Mass. 82; Forster *v.* Forster, 129 Mass. 559; Downer *v.* Whittier, 144 Mass. 448. *Michigan:* Warner *v.* Juif, 38 Mich. 662. *Mississippi:* Meaders *v.* Gray, 60 Miss. 400. *Missouri:* Broadway Sav. Bank *v.* Forbes, 79 Mo. 226; Borders *v.* Barber, 81 Mo. 636; Macon Co. *v.* Rodgers, 84 Mo. 66. *Nebraska:* Kellogg *v.* Lavender, 15 Neb. 256. *Ohio:* Monnett *v.* Sturges, 25 O. S. 384; Marietta Iron Works *v.* Lottimer, 25 O. S. 621; Hydraulic Co. *v.* Chatfield, 38 O. S. 575. *Tennessee:* Overton *v.* Bolton, 9 Heisk. 762; Wade *v.* Pratt, 12 Heisk. 231. *Texas:* Pridgen *v.* Andrews, 7 Tex. 461; Hopkins *v.* Crittenden, 10 Tex. 189. *Virginia:* Cecil *v.* Hicks, 29 Gratt. 1. *West Virginia:* Shipman *v.* Bailey, 20 W. Va. 140; Pickens *v.* McCoy, 24 W. Va. 344. *Wisconsin:* Spencer *v.* Maxfield, 16 Wis. 178; Pruyn *v.* Milwaukee, 18 Wis. 367.

(b) 29 Gratt. 1.

course, continue to run until payment. They never could have intended that if default were made by the debtor in the payment of the debt at maturity, he should thereafter pay interest at only one-half of the rate he had agreed to pay for the period during which he had a right under the contract to withhold the principal. . . . . At the date of the contract in question, the parties were authorized to agree upon a rate not exceeding 12 per centum per annum. In this case they agreed on that rate ; no doubt because the money, at that time and under the circumstances which then existed, was considered to be worth interest at that rate, both to the lender and the borrower ; and they stipulated accordingly, agreeing and expecting, no doubt, that at the end of six months the principal and interest would be paid by the borrower to the lender, to be used by the latter as might be most to his interest. . . . . There is no evidence of the extent of the loss, on the side of the lender, or gain on the side of the borrower, which has resulted from this default. Is it right to let the borrower, who could not obtain the money for *six months* at a less rate than 12 per cent. per annum, have it for an indefinite period thereafter at half that rate, against the will of the lender ?"

The question was considered, and many of the authorities on the subject collected in Overton *v.* Bolton,(a) and the court came to the conclusion that the contract rate should be allowed. The principle was not discussed at length, the court merely saying that they considered that the decisions in favor of the contract rate rested on stronger grounds than those on the other side. In Brannon *v.* Hursell,(b) the Supreme Court of Massachusetts adopted the same rule, Morton, J., without discussing the question, merely saying : " The plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract." In support of his decision, he cited four cases. The first, Ayer *v.* Tilden,(c) was an action on a note, made and payable in New York, and which contained no provision

(a) 9 Heisk. 762. (b) 112 Mass. 63. (c) 15 Gray 178.

about interest. Hoar, J., held that the *contract* must be governed by New York law, but that *interest* was only given as damages, and must therefore be given at the Massachusetts rate. Of the other three cases, two were English decisions, and did not decide the point, and the third case was an old New York one which is at variance with the later decisions of that State.

§ 327. **Rules in the Supreme Court of the United States.** —In the early decisions in this court[a] the statutory rate was adopted as the true rule; but in a later case,[b] which was an action on an Iowa contract, the court held that it was bound by the decisions of the Iowa courts, as on a question of local law. In a still later case[c] the court reaffirms the earlier cases as expressing its own rule of decision, when unembarrassed by any local rule adopted by State courts. Hence the authority of the Supreme Court can only in fairness be cited in favor of the statutory rate.

§ 328. **Conflict of decisions in Indiana.**—We have cited Indiana as one of the States in which the contract rate is allowed after maturity. This result was reached in that State by a process of reasoning which seems open to criticism. On a note payable on demand, or in one day, it has been decided, as we have just seen in the courts of States upholding the statute rate,[d] that the intention is clearly to make a continuing security on which the contract rate runs till paid. In Indiana after some conflict the rule in favor of the statute rate was established.[e]

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[a] Brewster *v.* Wakefield, 22 How. 118; Burnhisel *v.* Firman, 22 Wall. 170.

[b] Cromwell *v.* County of Sac, 96 U. S. 51.

[c] Holden *v.* Trust Co. 100 U. S. 72.

[d] See § 330.

[e] Burns *v.* Anderson, 68 Ind. 202; Richards *v.* McPherson, 74 Ind. 158.

In a case, however, turning on a note payable one day from date, the court allowed interest at the stipulated rate, but considering it to be necessary in order to reach this conclusion, overruled the decisions just cited, and now the rule of the contract rate is held to be the law of Indiana.(a) The Indiana cases cannot be regarded as giving much substantial support to the authority of the rule of the contract rate.

§ 329. **General conclusion.**—The arguments on which these opinions are based are open to various criticisms. In the first place, the doctrine that interest is an incident of the debt, due by contract, is an assumption of the very question to be decided. In the next place, the contract which the parties have made, and not that which we think they intended to make, is the one to be enforced. It seems also particularly objectionable to assume an intention to violate the contract. The decision must, of course, in each case depend upon the language used, but variations merely in the rate of interest can make no difference in the decision of the general question. Any valid arguments, therefore, employed to prove that the contract rate governs, will be equally applicable, whether the contract rate is above or below the statute rate. Apply this test to the case of Cecil *v.* Hicks, and it is apparent that the whole argument is founded upon the hardship of compelling the creditor to take 6 per cent. after maturity, when, perhaps, he might have obtained 12 per cent. for his money if the debtor had kept his agreement. To imply a promise to pay the stipulated rate after maturity is, we think, to introduce into the contract a provision which the language does not cover, and to violate both the principles upon which interest is given, and the rules

(a) Shaw *v.* Rigby, 84 Ind. 375; Kimmell *v.* Burns, 84 Ind. 370; Kerr *v.* Haverstick, 94 Ind. 178.

governing the interpretation of written instruments. With great deference to the high authority for the other view, the above review of the case seems to justify the conclusion that the decisions, upholding the statutory rate after maturity, are based upon a sounder foundation of reasoning.

§ 330. **Expressed intention always governs.**—In every jurisdiction, however, the clearly expressed intention of the parties governs. Thus where a contract bears interest at a stipulated rate "until paid," interest will be allowed at that rate after maturity.(a) And so in South Carolina, when interest was to be paid annually at a certain rate "upon the whole amount unpaid," it was held that interest at the stipulated rate should be allowed after maturity, the words practically meaning "till paid."(b) So where on a note payable in one year interest was payable "annually" at a certain rate, that rate was allowed after maturity.(c) So where the intention can be clearly implied to continue the stipulated rate, it will be given as on a note payable in one day ("practically a demand note"),(d) or on demand.(e) But on the other hand, where a contract bears interest at the stipulated rate "till the principal sum shall be payable," the stipulated rate cannot be recovered after maturity.(f)

(a) *Ex parte* Fewings, 25 Ch. Div. 338; Latham *v.* Darling, 2 Ill. 203; Dudley *v.* Reynolds, 1 Kas. 285; Small *v.* Douthitt, 1 Kas. 335; Young *v.* Thompson, 2 Kas. 83; Broadway S. B. *v.* Forbes, 79 Mo. 226; Hager *v.* Blake, 16 Neb. 12; Taylor *v.* Wing, 84 N. Y. 471; Lanahan *v.* Ward, 10 R. I. 299; Mobley *v.* Davega, 16 S. C. 73.

(b) Miller *v.* Hall, 18 S. C. 141; Miller *v.* Edwards, 18 S. C. 600.

(c) Westfield *v.* Westfield, 19 S. C. 85.

(d) Casteel *v.* Walker, 40 Ark. 117; Gray *v.* Briscoe, 6 Bush 687; Sharpe *v.* Lee, 14 S. C. 341; Piester *v.* Piester, 22 S. C. 139.

(e) Paine *v.* Caswell, 68 Me. 80.

(f) Spaulding *v.* Lord, 19 Wis. 533.

§ 331. **Stipulation for a higher rate after maturity.**—Where a higher rate of interest is stipulated to be paid after maturity than before, some courts have refused recovery on the ground that interest at the higher rate is a penalty ;([a]) but it is generally held to be recoverable.([b]) The question should, it would seem, be determined upon the principles of liquidated damages, for the higher rate is in the nature of a liquidation of damages for delay in performing the contract to pay money; and if the rate is grossly excessive, payment should not be enforced, and so it was held in an early case in Alabama.([c]) The courts, however, have not generally regarded the stipulation for a higher rate of interest after maturity in this light.

§ 332. **Interest on taxes.**—Where a defendant is in default in the payment of taxes, and is sued to recover the amount of them, he is not liable, in the absence of a statutory provision, for interest.([d]) This principle has been held to extend to the case of a county delinquent

([a]) Mason *v.* Callender, 2 Minn. 350; Talcott *v.* Marston, 3 Minn. 339; Kent *v.* Bown, 3 Minn. 347; Daniels *v.* Ward, 4 Minn. 168; Newell *v.* Houlton, 22 Minn. 19; White *v.* Iltis, 24 Minn. 43; Watts *v.* Watts, 11 Mo. 547.

([b]) Herbert *v.* S. & Y. Ry. Co., L. R. 2 Eq. 221; Miller *v.* Kempner, 32 Ark. 573; Portis *v.* Merrill, 33 Ark. 416; Browne *v.* Steck, 2 Col. 70; Buckingham *v.* Orr, 6 Col. 587; Lawrence *v.* Cowles, 13 Ill. 577; Smith *v.* Whitaker, 23 Ill. 367; Gould *v.* Bishop Hill Colony, 35 Ill. 324; Davis *v.* Rider, 53 Ill. 416; Witherow *v.* Briggs, 67 Ill. 96; Downey *v.* Beach, 78 Ill. 53; Funk *v.* Buck, 91 Ill. 575; Reeves *v.* Stipp, 91 Ill. 609; Wernwag *v.* Mothershead, 3 Blackf. 401; Gower *v.* Carter, 3 Ia. 244; Capen *v.* Crowell, 66 Me. 282; Davis *v.* Hendrie, 1 Mont. 499; Fisher *v.* Otis, 3 Chand. (Wis.) 83; Young *v.* Fluke, 15 U. C. C. P. 360.

([c]) Henry *v.* Thompson, Minor 209.

([d]) Perry County *v.* S. M. & M. R.R. Co., 65 Ala. 391; Perry *v.* Washburn, 20 Cal. 318, 350 (*semble*); Danforth *v.* Williams, 9 Mass. 324. But it was held in Texas that where one wrongfully enjoined the collection of taxes from himself he should pay interest on the taxes by way of damages. Rosenberg *v.* Weekes, 67 Tex. 578.

in paying its quota of taxes to the State.(a) It has, however, been held that where by statute the expense of improving a street is assessed upon the abuttors, interest may be recovered from a delinquent abuttor.(b)

§ 333. **On fines and penalties.**—No interest can be recovered for delay in paying a fine imposed in a criminal case.(c) And similarly, where a national bank for taking usurious interest, is liable to a penalty, in favor of the debtor, though it is recovered in a civil action, the debtor cannot have interest upon it before judgment.(d) This principle would prevent the recovery of interest in any *qui tam* action. So where by statute the highest market value of property destroyed between the time of destruction and of trial is allowed, this statute is held to be a penal one, and interest is not allowed.(e)

§ 334. **On judgments.**—The allowance of interest on judgments generally has been a subject of much discussion. In England, the doubt was solved by a statute, which declared that every judgment debt shall carry interest at the rate of four per centum per annum, from the time of entering up the judgment, or from the time of the passage of the act in cases of judgment then entered up and not carrying interest, until the same shall be satisfied; and that such interest might be levied under a writ of execution on such judgment.[1]

In New York, it has been decided that interest is re-

[1] 1 & 2 Vict. c. 110, § 17. See Fisher *v.* Dudding, 3 M. & G. 238. See, also, Crafts *v.* Wilkinson, 4 Q. B. 74.

(a) State *v.* Multnomah County, 13 Ore. 287. *Contra*, State *v.* Van Winkle, 43 N. J. L. 125.

(b) Gest *v.* Cincinnati, 26 Oh. St. 275.

(c) State *v.* Steen, 14 Tex. 396.

(d) Highley *v.* First Nat. Bank, 26 Oh. St. 75.

(e) Smith *v.* Morgan, 73 Wis. 375; *acc.* Central R.R. & B. Co. *v.* Atlantic & G. R.R. Co., 50 Ga. 444; Ware *v.* Simmons, 55 Ga. 94.

coverable in an action of debt on judgment, whether the original demand carried interest or not.[1] And this is generally followed, either by statute or by interpretation of the common law.([a]) It is, however, generally held that interest cannot be included in a levy on the judgment or in a *scire facias.*([b])

In Vermont it is held that all claim for interest is waived by suing out a *scire facias;*([c]) but in New Hamp-

[1] Klock *v.* Robinson, 22 Wend 157, where the English cases are reviewed.

([a]) By common law: Perkins *v.* Fourniquet, 14 How. 328, 331; Crawford *v.* Simonton, 7 Port. 110; Gwinn *v.* Whitaker, 1 H. & J. 754; Hodgdon *v.* Hodgdon, 2 N. H. 169; Mahurin *v.* Bickford, 6 N. H. 567; Harrington *v.* Glenn, 1 Hill (S. C.) 79; Nelson *v.* Felder, 7 Rich. Eq. 395; Beall *v.* Silver, 2 Rand. 401; Mercer *v.* Beale, 4 Leigh 189; Booth *v.* Ableman, 20 Wis. 602. By statute: Dougherty *v.* Miller, 38 Cal. 548; Brigham *v.* Vanbuskirk, 6 B. Mon. 197; Todd *v.* Botchford, 86 N. Y. 517; Coles *v.* Kelsey, 13 Tex. 75; Hagood v. Aikin, 57 Tex. 511. Not without a statute: Reece *v.* Knott, 3 Utah, 451. In Kentucky, in an action of covenant on an agreement to pay for property, judgment was obtained. Suit was brought on that judgment, and the jury were told that *they were bound to* give interest on the jndgment. The original agreement contained no stipulation for interest. The Court of Appeals said: "It is true, according to the ancient course of the common law, although the value of the thing covenanted to be performed usually regulated the amount of damages, the jury in an action sounding altogether in damages did in some instances exceed that measure; but they did not so because the law subjected the covenantor to the payment of interest, but in the exercise of a sound discretion with which they were invested, regulated by what, under the peculiar circumstances of the case, they might think just." And for the reason that the charge controlled the discretion of the jury, the judgment was reversed. Guthrie *v.* Wickliffs, 4 Bibb. 541; S. P. Cogwell's Heirs *v.* Lyons, 3 J. J. Marsh 38.

([b]) Perkins *v.* Fourniquet, 14 How. 328, 331; Solen *v.* Virginia & T. R.R. Co., 14 Nev. 405; Barron *v.* Morrison, 44 N. H. 226; Watson *v.* Fuller, 6 Johns. 283; Mann *v.* Taylor, 1 McC. 171; Williamson *v.* Broughton, 4 McC. 212; Hall *v.* Hall, 8 Vt. 156. By statute, however, interest is often included in the execution. So in New York: Sayre *v.* Austin, 3 Wend. 496; Co. Civ. Proc., § 1211. On all judgments in civil cases in the United States District or Circuit Courts, interest is allowed wherever, by the law of the State in which such Circuit or District Court is held, interest may be levied under execution on judgments recovered in the State courts. Laws 1842, ch. 188, § 8 (5 U. S. Stat. at Large, 518).

([c]) Hall *v.* Hall, 8 Vt. 156.

shire it is held that if any part of the principal is unsatisfied, the balance of the principal with all the accrued interest may be recovered by action on the judgment.[a] In some States interest is allowed only on the principal sum due;[b] in some, on the principal and interest;[c] in others still (perhaps most), on the whole amount, principal, interest, and costs.[d] As the judgment is looked upon as a debt, there is no reason for making any distinction between the different constituents of the debt. In Pennsylvania, interest is allowed on such costs only as have actually been paid, and then from the time of payment. This is founded on the local custom of that State as to costs.[e] It was intimated in an early case in Pennsylvania that where several successive suits were brought on a judgment, interest would be allowed only on the amount of the original judgment;[f] but it was decided, later, that interest would in each case be allowed on the amount of the preceding judgment.[g]

Since interest is given as damages for the detention of the judgment debt, the rate should be that established by statute.[h] Some States, however, provide by statute that a judgment recovered on an interest-bearing obliga-

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[a] Hodgdon *v.* Hodgdon, 2 N. H. 169.

[b] Pinckney *v.* Singleton, 2 Hill (S. C.) 343.

[c] Corcoran *v.* Doll, 32 Cal. 82.

[d] Emmitt *v.* Brophy, 42 Oh. St. 82; Laidley *v.* Merrifield, 7 Leigh 346.

[e] Rogers *v.* Burns, 27 Pa. 525. This principle is carried so far that a sheriff suing to recover his costs is not allowed interest on them: Galbraith *v.* Walker, 95 Pa. 481.

[f] Meason's Estate, 4 Watts 341.

[g] Fries *v.* Watson, 5 S. & R. 220.

[h] *Ex parte* Fewings, 25 Ch. Div. 338; Wayman *v.* Cochrane, 35 Ill. 152; Corgan *v.* Frew, 39 Ill. 31; Wilson *v.* Marsh, 13 N. J. Eq. 289; Taylor *v.* Wing, 84 N. Y. 471.

tion shall continue to bear interest at the stipulated rate.(a)

§ 335. **Between verdict and judgment.**—In some jurisdictions interest is not recoverable between verdict and judgment,(b) although it is sometimes held that the jury has the power to find a verdict for a certain amount "with interest."(c) In other jurisdictions, interest continues to accrue on an interest-bearing claim,(d) and in others still on any claim, of whatever nature,(e) but only on the principal amount, not on interest which may be included in the judgment.(f) And it would seem that in those States where points of law are carried up, not by an appeal from a judgment or by a writ of error from it, but by a bill of exceptions, interest should be allowed on the verdict as it would on a judgment appealed from. The matter is almost everywhere regulated by statute.(g)

§ 336. **In error.**—* Interest is sometimes given in error, by way of damages. In an early case,[1] on affirmance of judgment in the King's Bench on error, a rule was ob-

[1] Zink *v.* Langton, 2 Douglass, 751, in notes.

(a) Corcoran *v.* Doll, 32 Cal. 82; Daniel *v.* Gibson, 72 Ga. 367; Burrows *v.* Stryker, 47 Ia. 477; Rogers *v.* Lee County, 1 Dill. 529 (Mo.); Hydraulic Co. *v.* Chatfield, 38 Oh. St. 575; Hagood *v.* Aikin, 57 Tex. 511.

(b) Hallum *v.* Dickinson, 14 S. W. Rep. 477 (Ark.); Baltimore C. P Ry. Co. *v.* Sewell, 37 Md. 443; Lord *v.* New York, 3 Hill 426; Henning *v.* Van Tyne, 19 Wend. 101; Kelsey *v.* Murphy, 30 Pa. 340; Norris *v.* Philadelphia, 70 Pa. 332.

(c) Irvin *v.* Hazleton, 37 Pa. 465.

(d) Dowell *v.* Griswold, 5 Sawy. 23; Swails *v.* Cissna, 61 Ia. 693.

(e) Gibson *v.* Cincinnati Enquirer, 2 Flip. 88; Com. *v.* Boston & M. R.R. Co., 3 Cush. 25; Johnson *v.* Atlantic & S. L. R.R. Co., 43 N. H. 410; McLimans *v.* Lancaster, 65 Wis. 240.

(f) McKim *v.* Blake, 139 Mass. 593.

(g) Thus in New York by the act of May 7, 1844, interest is to be taxed on all verdicts and reports of referees, as costs, from the time of obtaining them to that of perfecting the judgment. Co. Civ. Proc., § 1235.

tained to show cause why the master should not compute interest, and add it to the costs, on the ground of an old statute,[1] which enacted on a writ of error being brought, and judgment affirmed, the person against whom it is sued out shall recover his costs and damages. And it was held that "interest ought to be the measure of damages."

The principle of this statute has been fixed in American legislation. By the judiciary act of the United States,[2] the Supreme Court is authorized, in case of affirmance of any judgment or decree, to award to the respondent just damages for his delay. And by the rules of the same court,[3] in cases where the suit is defended for mere delay, damages are to be awarded at the rate of ten per centum per annum on the amount of the judgment, to the time of the affirmance thereof. Where there is a real controversy, the damages are to be at the rate of six per cent. per annum only. And in both cases, the interest is to be computed as part of the damages. It is, therefore, entirely for the decision of the court, whether any damages, or interest as a part thereof, are to be allowed or not, in cases of affirmance.[4] ([a])

The same principle was followed in New York,([b]) where it was provided by statute,[5] that "If upon writ of error, the judgment be affirmed, or the writ be discon-

[1] 3 Hen. VII., c. 10.
[2] 1789, c. 20, § 23.
[3] Made in February Term, 1803, and February Term, 1807.
[4] Boyce's Executors *v.* Grundy, 9 Peters 275; Himely *v.* Rose, 5 Cranch 313; Santa Maria, 10 Wheat. 431, 442.
[5] 2 R. S. 618, § 32.

([a]) Hall *v.* Jordan, 19 Wall. 271; West W. Ry. Co. *v.* Foley, 94 U. S. 100. But where *both* parties appeal, interest is not allowed to the prevailing party: The Rebecca Clyde, 12 Blatch. 403; nor is it allowed where the prevailing party appeals, and the appeal is dismissed: Cook *v.* South Park Comm'rs, 61 Ill. 115.

([b]) *Ac*. Palmer *v.* Murray, 8 Mont. 312; McCausland *v.* Bell, 9 S. & R. 388; Smith *v.* Pike, 44 Vt. 61.

tinued or quashed, or the plaintiff in error be nonsuited, the defendant in error shall recover costs, and also *damages for the delay and vexation, to be assessed in the discretion of the court* before whom the writ was returnable."([a]) The limit of discretion under this statute was legal interest. The allowance of damages, however, in these cases, rests entirely in discretion; and so, where the action was in tort, the Court of Errors refused it.[1] It was allowed, however, in another case, on a judgment in trover.[2] But this branch of the subject rather belongs to the head of statutes regulating damages, which we shall elsewhere consider.**

§ 337. **Municipal corporations—The State.**—It is a controverted question whether municipal corporations are liable for interest except upon express contract or in consequence of a statute. It seems clear that municipal corporations are not required to seek their creditors; the creditor must seek the debtor if the debtor is a municipal body. A municipal body is therefore not in default till payment of the debt is demanded, and no interest can be recovered until that time.([b]) In some States it is held that municipal corporations are not liable to interest at all.([c]) And so it has been held as to the State.([d]) Some

[1] Gelston *v.* Hoyt, 13 Johns. 561.

[2] Bissell *v.* Hopkins, 4 Cow. 53. In the same State it has been said that "the judicial doctrine of allowing and disallowing interest on judgments, whether on affirmance in error, or in other cases, seems in some respects to rest rather upon arbitrary discretion, practice, or precedent, than any principle which conforms to our general notions of justice." Klock *v.* Robinson, 22 Wend. 157, 160.

([a]) Superseded by the Code of Civil Procedure.

([b]) Paul *v.* New York, 7 Daly 144; Yellowly *v.* Pitt County, 73 N. C. 164.

([c]) Wheeler *v.* Newberry County, 18 S. C. 132; Ashe *v.* Harris County, 55 Tex. 49. In Illinois and Mississippi by interpretation of the statutes: Pekin *v.* Reynolds, 31 Ill. 529; Chicago *v.* People, 56 Ill. 327; Warren County *v.* Klein, 51 Miss. 807; Clay County *v.* Chickasaw County, 64 Miss. 534. In Pennsylvania, because the debts are payable only out of taxes, and therefore not until there are funds: Allison *v.* Juniata County, 50 Pa. 351.

([d]) Whitney *v.* State, 52 Miss. 732.

States, however, allow interest on claims against municipal corporations from time of demand.[a] Apart from statutory reasons, there seems to be no principle of law which should exempt political corporations from liability for interest.

§ 338. **Interest after payment of the principal.**—* Where interest is not stipulated for in the contract, but is recoverable merely as damages, a creditor is precluded from sustaining an action for its recovery after accepting the principal;[b] but where interest is stipulated for in the contract, suit may be brought for it, although the principal has been paid.[c] So, payment of the amount of principal money due from a debtor to his creditor, will not necessarily prevent an action for the amount of interest. If made generally, it applies first to extinguish the interest, and the balance may be sued for as the principal.[1] **

§ 339. **Rate of interest.**—Where interest is recovered as damages, the rate is that established by statute. This was held in an action of replevin for a savings-bank book; where the statutory rate of interest was given as damages for detention of the book, though the bank paid a lower rate on deposits.[d] Where no rate is fixed by statute,

[1] People *v.* New York, 5 Cow. 331.

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[a] Jacks *v.* Turner, 36 Ark. 89; Robbins *v.* Lincoln County, 3 Mo. 57; Risley *v.* Andrew County, 46 Mo. 382; Paul *v.* New York, 7 Daly 144; Yellowly *v.* Pitt County, 73 N. C. 164.

[b] Succession of Mann, 4 La. Ann. 28; Succession of Anderson, 12 La. Ann. 95; American Bible Society *v.* Wells, 68 Me. 572; Southern C. R.R. Co. *v.* Moravia, 61 Barb. 180; Tenth Nat. Bank *v.* New York, 4 Hun 429.

[c] Robbins *v.* Cheek, 32 Ind. 328; Stone *v.* Bennett, 8 Mo. 41; Fake *v.* Eddy, 15 Wend. 76; King *v.* Phillips, 95 N. C. 245.

[d] Wegner *v.* Second Ward Savings Bank, 76 Wis. 242.

the customary rate may be recovered.(a) If the statutory rate is changed after the right of action accrues, interest is reckoned at the old rate until the change, then at the new rate.(b) Where a judgment by its terms bore interest, it was held that the rate should not be changed with a change in the statutory rate.(c) And in New Jersey it was held that where the judgment is on a contract to pay money, the legal rate of interest, in the absence of a stipulated rate, became part of the contract; and the rate could not be changed by statute, even after judgment.(d) An annuity was created when interest was at the rate of five per cent., which was afterwards changed; it was held that interest on the arrears of the annuity should continue to be allowed at the rate of five per cent.(e) The case seems in conflict with the current of authorities.

§ 340. **What will relieve a defendant from interest.**— Since interest is given as damages for delay in payment, if the defendant was not chargeable with the delay, interest will not run against him. The commonest case in which the defendant is not charged with delay, and is therefore relieved, is that of tender. When a debtor makes a legal tender of the amount of the debt, he is chargeable no longer with interest or any other damages. This proposition is so elementary as to require no authorities. Upon a similar principle, when in an action of tort it appears that the wrong-doer before trial offered to pay an amount greater than that found due by the jury,

(a) Davis *v.* Greely, 1 Cal. 422; Perry *v.* Taylor, 1 Utah 63.

(b) White *v.* Lyons, 42 Cal. 279; Woodward *v.* Woodward, 28 N. J. Eq. 119; Wilson *v.* Cobb, 31 N. J. Eq. 91; *In re* Doremus, 33 N. J. Eq. 234; Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Reese *v.* Rutherford, 90 N. Y. 644; Sanders *v.* Lake S. & M. S. Ry. Co., 94 N. Y. 641; O'Brien *v.* Young, 95 N. Y. 428; Stark *v.* Olney, 3 Ore. 88.

(c) Prouty *v.* Lake S. & M. S. Ry. Co., 26 Hun 546.

(d) Cox *v.* Marlatt, 36 N. J. L. 389.

(e) Thorntons *v.* Fitzhugh, 4 Leigh 209.

no interest will be allowed, though the case is otherwise a proper one for its recovery.(a)

Where commercial paper is payable at a certain place, and at maturity the payor has funds there to pay it, he is not chargeable with interest so long as he keeps the funds there.(b) If the plaintiff himself is chargeable with the delay, he cannot recover compensation for it. So where a plaintiff prosecuted a claim to recover an overpayment of customs with such unreasonable delay as to amount to laches, it was held that the court might refuse him interest.(c) So where the creditor leaves the jurisdiction without notice to the debtor and cannot be found, the debtor is not chargeable with interest till demand.(d)

In Anderton *v.* Arrowsmith,(e) the plaintiff sued on an indemnity bond to recover sums of money he had paid. The bond was conditioned to pay all claims, demands, costs, charges, damages, and expenses. A special verdict was taken for the amount claimed, with interest, and a finding that the plaintiff had been negligent in not collecting the debt from the sureties on the bond; and it was left to the court to say whether the plaintiff could recover the interest. Lord Denman, C. J., said: "But assuming that interest might be recovered under the name of damages on a bond conditioned like this, we think that the negligence found by the jury makes all the difference in this question; if promptly obtained from the surety and promptly repaid out of defendant's estate,

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(a) Thompson *v.* Boston & M. R.R. Co., 58 N. H. 524.

(b) Miller *v.* Bank of Orleans, 5 Whart. 503.

(c) Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174; Bartells *v.* Redfield, 27 Fed. Rep. 286; Stewart *v.* Schell, 31 Fed. Rep. 65.

(d) Laura Jane *v.* Hagen, 10 Humph. 332.

(e) 2 P. & D. 408.

no interest might have become due at all, and we cannot say that that would not have been the most gainful course for defendant. . . . . We cannot see that the interest now claimed has been lost to plaintiffs by defendant's default rather than by their own negligence." Interest seems to have been refused in this case on the principle that the plaintiff cannot recover damages which he has himself caused.

So where the debtor is forbidden by law to pay the debt, he is not chargeable with interest for delay in paying it. This happens in time of war, when a debtor is in one hostile country and the creditor in the other; interest is not given while that state of things continues.[a] This is true only of interest given as damages, not of interest accruing on a contract. So, if a contract does not mature until after the war, interest may be recovered.[b] And if it matures during the war, interest runs to maturity.[c] But if the creditor has a known agent in the same country with the debtor it is the debtor's duty to pay such agent, and interest therefore does not cease.[d] And where the creditor and the sureties are in the same country, interest runs against the sureties, though not against the debtor.[e]

Where a foreign attachment, trustee process, or injunction is laid on a party liable to pay interest, the interest ceases running till the legal impediment is re-

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[a] Hoare *v.* Allen, 2 Dall. 102; Foxcroft *v.* Nagle, 2 Dall. 132; Bigler *v.* Waller, Chase Dec. 316; Mayer *v.* Reed, 37 Ga. 482; Selden *v.* Preston, 11 Bush 191; Bordley *v.* Eden, 3 H. & McH. 167; Brewer *v.* Hastie, 3 Call 22.

[b] Lash *v.* Lambert, 15 Minn. 416.

[c] Brown *v.* Hiatts, 15 Wall. 177.

[d] Ward *v.* Smith, 7 Wall. 447; Conn *v.* Penn., Pet. C. C. 496; Denniston *v.* Imbrie, 3 Wash. C. C. 396.

[e] Bean *v.* Chapman, 62 Ala. 58.

moved.(a) So where a fund is deposited in a bank (b) or in court (c) awaiting an order of the court for its payment, it does not bear interest. In some States it is held that a garnishee or party enjoined can relieve himself from the payment of interest only by bringing the money into court.(d) In any State, if the garnishee is in collusion with either party, or denies his indebtedness and litigates the question, he is chargeable with interest; (e) and so if it can be shown that he used the money during the pendency of the case instead of keeping it on hand to pay over at any time.(f)

Where, by an arrangement with a banking firm, a depositor was allowed five per cent. interest on his current balance, and he died having a balance in their hands, and a period of nearly four years elapsed between his death and the issue of letters of administration on his estate, the bankers not having signified their election not to use

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(a) Legrange *v.* Hamilton, 4 T. R. 613; Hamilton *v.* Legrange, 2 H. Black. 144; Osborn *v.* U. S. Bank, 9 Wheat. 738; Bainbridge *v.* Wilcocks, Bald. 536; Willings *v.* Consequa, Pet. C. C. 172, 301; Norris *v.* Hall, 18 Me. 332; Oriental Bank *v.* Tremont Ins. Co., 4 Met. 1; Bickford *v.* Rich, 105 Mass. 340; Huntress *v.* Burbank, 111 Mass. 213; Smith *v.* Flanders, 129 Mass. 322; Le Branthwait *v.* Halsey, 9 N. J. L. 3; Kellogg *v.* Hickok, 1 Wend. 521; Stevens *v.* Barringer, 13 Wend. 639; Fitzgerald *v.* Caldwell, 2 Dall. 215; 1 Yeates 274; Jackson *v.* Lloyd, 44 Pa. 82. But *contra*, Wallis *v.* Dilley, 7 Md. 237.

(b) Taylor *v.* Minor, 14 S. W. Rep. 544 (Ky).

(c) Bowman *v.* Wilson, 2 McCrary 394.

(d) Kirkman *v.* Vanlier, 7 Ala. 217; Godwin *v.* McGehee, 19 Ala. 468; Bullock *v.* Ferguson, 30 Ala. 227; Curd *v.* Letcher, 3 J. J. Marsh. 443; Smith *v.* German Bank, 60 Miss. 69; Candee *v.* Webster, 9 Oh. St. 452; Templeman *v.* Fauntleroy, 3 Rand. 434.

(e) Work *v.* Glaskins, 33 Miss. 539; Stevens *v.* Gwathmey, 9 Mo. 628; Rushton *v.* Rowe, 64 Pa. 63; Jones *v.* Manufacturers' Nat. Bank, 99 Pa. 317.

(f) Mattingly *v.* Boyd, 20 How. 128; Norris *v.* Hall, 18 Me. 332. In Greenish *v.* Standard Sugar Refinery, 2 Low. 553, it was held that the garnishee, having had the use of the money, must pay interest at the actual market rate, but was not liable for the statutory rate.

the amount by making a special deposit of it in some bank, or by keeping a fund continually reserved to the extent of the balance, were held liable to pay the administrator the five per cent. interest during the period.(a)

§ 341. **Interest not affected by intent.**—The cases all depend upon the principle that where one party commits a wrongful act, he is liable in damages to the party injured. It is therefore unnecessary to the allowance of interest that there should have been any wrongful intent. Thus, in Sumner *v.* Beebe (b) the happening of the event upon which the debt became due was unknown to the defendant. The court held, however, that as it was one not within the special knowledge of the plaintiff, the defendant was bound to know when the event happened, and was liable, therefore, for interest.

§ 342. **Conflict of laws.**—It has been held that on a foreign judgment interest is recoverable at the rate of the forum, though it does not appear whether the judgment bore interest by the law of the country where it was rendered.(c) But the contrary opinion is often held. In some States it is said that *if the foreign rate is not proved* it will be presumed to be the same as the domestic rate.(d) In Virginia, in an action on a foreign judgment, after the defendant's demurrer overruled, the court awarded a writ of inquiry to assess damages; which would be necessary only if interest were to be awarded at the foreign rate.(e) In California it has been held

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(a) Watts *v.* Garcia, 40 Barb. 656.

(b) 37 Vt. 562.

(c) Parker *v.* Thompson, 3 Pick. 429; Barringer *v.* King, 5 Gray 9; Hopkins *v.* Shepard, 129 Mass. 600; Nelson *v.* Felder, 7 Rich. Eq. 395.

(d) Crone *v.* Dawson, 19 Mo. App. 214; Pauska *v.* Daus, 31 Tex. 67; Porter *v.* Munger, 22 Vt. 191.

(e) Clarke *v.* Day, 2 Leigh 172.

that in the absence of evidence a foreign judgment will be presumed not to bear interest.(a)

It has been intimated that the foreign law as to interest must be carried out in order to give "full effect and credit" to the judgment of another State.(b) But in Massachusetts, with more reason, it has been held that the rate of interest is not part of the judgment, and no effect need constitutionally be given to it; even when the judgment by its terms bears interest, this is not an integral part of the judgment, and interest is allowed at the domestic rate.(c)

In an action on overdue coupons, it was held that interest should be recovered on them at the rate of the forum.(d) But the opposite opinion is often held in action of contract. It is held that the interest after maturity shall be allowed either at the rate of the place of performance,(e) or of the place of contracting.(f) So a consignor is entitled to interest according to the law of the place to which the goods were consigned for sale.(g) Where the plaintiff performed services at Valparaiso, the defendant lived in Boston, and the action was brought in New York, interest has been allowed from the commencement of the suit at the rate of the *lex fori*, the court saying, "especially as no rate is fixed by the contract, and no

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(a) Cavender *v.* Guild, 4 Cal. 250. It will be noted that interest in California is allowed on judgments only by statute, not by the common law.

(b) Schell *v.* Stetson, 12 Phila. 187.

(c) Clark *v.* Child, 136 Mass. 344.

(d) Fauntleroy *v.* Hannibal, 5 Dill. 219.

(e) Pana *v.* Bowler, 107 U. S. 529; Sutro Tunnel Co. *v.* Segregated B. M. Co., 19 Nev. 121. So in actions for non-payment of mercantile paper; see chapter on Bills and Notes.

(f) Gibbs *v.* Fremont, 9 Ex. 25; Courtois *v.* Carpentier, 1 Wash. C. C. 376; French *v.* French, 126 Mass. 360; Pauska *v.* Daus, 31 Tex. 67; Porter *v.* Munger, 22 Vt. 191.

(g) Fanning *v.* Consequa, 17 Johns. 511.

place designated for its performance."([a]) Where property is converted or destroyed by a tort, it has been held that interest on the value should be allowed at the rate of the place where the cause of action accrued.([b])

§ 343. **Compound interest not originally allowed.**—*In regard to compound interest, or interest on interest, there has existed much doubt and difference of opinion. It was rigorously prohibited by the Roman law: *Nullo modo usuræ usurarum a debitoribus exigantur.*[1] The English law followed in the same track. So, in an early case in chancery, Lord Cowper held a clause in a mortgage, that if the interest was behind six months, then it should be accounted principal and compound interest, was "void and of no use"; "that to make interest principal, it is requisite that it be grown due, and then an agreement concerning it may make it principal."[2] It is not regarded as within the statutory prohibition of usury, but as leading to oppression and abuse. So Lord Eldon has said, "There is nothing unfair or perhaps illegal in taking a covenant, originally, that if interest is not paid at the end of the year, it shall be converted into principal. But this court will not permit that, as tending to usury, though it is not usury."[3]

The cases were reviewed at length by Chancellor Kent, in an early case in New York; and it was said, "The cases and language in the books are clear in acknowledging the rule that even an agreement, made at the time of the original contract, to allow interest upon interest as it should become due is not to be supported";[4]

[1] Cod. 4, 32, 38.
[2] Ossulston *v.* Yarmouth, 2 Salk. 449 [*acc.* Daniell *v.* Sinclair, L. R. 6 App. Cas. 181].
[3] Chambers *v.* Goldwin, 9 Ves. 254, 271.
[4] Connecticut *v.* Jackson, 1 Johns. Ch. 13.

([a]) Goddard *v.* Foster, 17 Wall. 123.

([b]) Ekins *v.* East India Co., 1 P. Wms. 395; Holmes *v.* Barclay, 4 La. Ann. 64.

and he placed the objection to the provision on the ground of its harsh and oppressive character. Again in a subsequent case, the same learned judge laid down the rule that "*compound interest cannot be demanded and taken, except upon a special agreement made after the interest has become due*";[1] and the general principle has been again and still more recently redeclared.([a]) In this case it was said, however, that if compound interest be voluntarily paid, it cannot be recovered back.[2] So in ascertaining the amount due on a note made payable with interest annually, simple interest only is to be computed;[3] and interest on the interest will not be allowed.[4] But if a new note is given for the interest, it is thereby converted into capital, and it may be given with interest.[5]

§ 344. **Except by mercantile custom, or for fraud.**—An exception was, however, recognized as introduced by the usages of modern trade to the general rule which denies compound interest. As between merchants upon their mutual accounts, it is the custom to cast interest upon the several items, and to strike a balance at the end of the year of the items of principal and those of interest, and to carry the footing of the two to a new account, as forming the first item of principal for the ensuing year. In this

[1] Van Benschooten *v.* Lawson, 6 Johns. Ch. 313.

[2] See also, as to demand of compound interest, Von Hemert *v.* Porter, 11 Met. 210. In Connecticut, a contract for the payment of compound interest, made before interest has accrued, is to that extent void, and will not, unless in special cases, be enforced either in law or in equity. Camp *v.* Bates, 11 Conn. 487; Rose *v.* Bridgeport, 17 Conn. 243. In Louisiana, compound interest is prohibited by the Code: "Interest upon interest cannot be recovered, unless it be added to the principal and by another contract made a new debt. No stipulation to that effect in the original contract is valid." Art. 1939. The whole subject of interest is codified in that State. In Indiana, see Niles *v.* Board of Commis'rs, 8 Blackf. 158.

[3] Hastings *v.* Wiswall, 8 Mass. 455; Dean *v.* Williams, 17 Mass. 417; Von Hemert *v.* Porter, 11 Met. 210; Doe *v.* Warren, 7 Me. 48.

[4] Ferry *v.* Ferry, 2 Cush. 92.

[5] Wilcox *v.* Howland, 23 Pick. 167.

([a]) Paulling *v.* Creagh, 54 Ala. 646; Mason *v.* Callender, 2 Minn. 350; Hager *v.* Blake, 16 Neb. 12; Mowry *v.* Bishop, 5 Paige 98; Averill C. & O. Co. *v.* Verner, 22 Oh. St. 372; Genin *v.* Ingersoll, 11 W. Va. 549.

manner, yearly rests, as they are called, have for a long time been made and acquiesced in by the mercantile world.(a) But after the mutual trade and dealings have ceased, the right to make annual rests ceases; and in the absence of any specific agreement, the creditor is allowed simple interest only on the balance of his account; the right to make the yearly rests growing out of the mutuality of the debts and credits; and the allowing of interest on each side.[1] ** This custom does not extend to accounts between mortgagor and mortgagee, and in the absence of an express agreement compound interest cannot be recovered on a mortgage.(b)

Another exception to the general rule denying compound interest grows out of the conduct of the defendant; where that is grossly delinquent or intentionally contrary to his duty, compound interest is sometimes inflicted by way of punishment.[2] Thus a trustee using the trust funds for his own profit is often held liable to pay compound interest.(c) Where partial payments have been made in cash, or by rents and profits, or otherwise, the payments are to be first applied to the satisfaction of the interest then due,(d) and the balance only is to go towards the reduction of the principal.[3]

[1] Denniston *v.* Imbrie, 3 Wash. C. C. 396; Von Hemert *v.* Porter, 11 Met. 210.

[2] Ackerman *v.* Emott, 4 Barb. 626.

[3] Dean *v.* Williams, 17 Mass. 417; Fay *v.* Bradley, 1 Pick. 194; Reed *v.* Reed, 10 Pick. 398. In New Hampshire, it was said, in an early case (1818), that on a note payable with interest annually, interest at the rate of six per cent. per annum should be cast on the principal, and interest on the annual interest in the nature of damages for its detention, from the time it became payable. Peirce *v.* Rowe, 1 N. H. 179.

(a) Eaton *v.* Bell, 5 B. & Ald. 34; Barclay *v.* Kennedy, 3 Wash. C. C. 350; Von Hemert *v.* Porter, 11 Met. 210; Stoughton *v.* Lynch, 2 Johns. Ch. 209; Reddington *v.* Gilman, 1 Bosw. 235; Langdon *v.* Castleton, 30 Vt. 285; Davis *v.* Smith, 48 Vt. 52.

(b) Young *v.* Hill, 67 N. Y. 162.

(c) Merrifield *v.* Longmire, 66 Cal. 180; Connecticut *v.* Howarth, 48 Conn. 207; Jennison *v.* Hapgood, 10 Pick. 77, 104; Schieffelin *v.* Stewart, 1 Johns. Ch. 620.

(d) Heartt *v.* Rhodes, 66 Ill. 351.

§ 345. **Interest on arrears of stipulated interest.**—The old rule still prevails, so far as to prevent compound interest when recovered as damages.([a]) But where interest is by the terms of the contract payable at a fixed day, interest may be recovered as damages for non-payment of it. Thus where on a note or other agreement for the payment of money it is stipulated that a certain amount shall be paid as interest on a fixed day, upon default in payment interest on the stipulated amount may, by the better opinion, be recovered by way of damages.([b])

Interest is usually allowed on arrears of an annuity,([c]) though it is in form an obligation for the payment of interest on a certain sum.([d]) And interest is almost univers-

([a]) Lewis *v.* Small, 75 Me. 323.

([b]) Calhoun *v.* Marshall, 61 Ga. 275; Tillman *v.* Morton, 65 Ga. 386; Wofford *v.* Wyly, 72 Ga. 863; Mann *v.* Cross, 9 Ia. 327; Hershey *v.* Hershey, 18 Ia. 24; Preston *v.* Walker, 26 Ia. 205; Burrows *v.* Stryker, 47 Ia. 477; Talliaferro *v.* King, 9 Dana 331; Peirce *v.* Rowe, 1 N. H. 179; Bledsoe *v.* Nixon, 69 N. C. 89; Anketel *v.* Converse, 17 Oh. St. 11; Cramer *v.* Lepper, 26 Oh. St. 59; Wheaton *v.* Pike, 9 R. I. 132; Lanahan *v.* Ward, 10 R. I. 299; Henderson *v.* Laurens, 2 Dess. (S. C.) 170; Singleton *v.* Lewis, 2 Hill (S. C.) 408; Gibbs *v.* Chisolm, 2 N. & McC. 38; Doig *v.* Barkley, 3 Rich. 125; O'Neall *v.* Bookman, 9 Rich. 80; House *v.* Tennessee F. C., 7 Heisk. 128; Lewis *v.* Paschal, 37 Tex. 315; Catlin *v.* Lyman, 16 Vt. 44.

That interest may not be recovered on arrears of interest: Broughton *v.* Mitchell, 64 Ala. 210; Montgomery *v.* Tutt, 11 Cal. 307; Doe *v.* Vallejo, 29 Cal. 385 (by statute); Denver B. & M. Co. *v.* McAllister, 6 Col. 261; Rose *v.* Bridgeport, 17 Conn. 243; Leonard *v.* Villars, 23 Ill. 377; Niles *v.* Board, 8 Blackf. 158; Doe *v.* Warren, 7 Me. 48; Banks *v.* McClellan, 24 Md. 62 (*contra*, Fitzhugh *v.* McPherson, 3 Gill. 408); Hastings *v.* Wiswall, 8 Mass. 455; Henry *v.* Flagg, 13 Met. 64; Van Husan *v.* Kanouse, 13 Mich. 303; Dyar *v.* Slingerland, 24 Minn. 267 (reluctantly following Mason *v.* Callender, 2 Minn. 350); Corrigan *v.* Trenton D. F. Co., 5 N. J. Eq. 232, 245; Mowry *v.* Bishop, 5 Paige, 98; Young *v.* Hill, 67 N. Y. 162 (*contra*, Howard *v.* Farley, 3 Robt. 308); Sparks *v.* Garrigues, 1 Binn. 152; Stokely *v.* Thompson, 34 Pa. 210; Pindall *v.* Bank of Marietta, 10 Leigh, 481; Genin *v.* Ingersoll, 11 W. Va. 549.

([c]) Elliott *v.* Beeson, 1 Harr. 106; Houston *v.* Jamison, 4 Harr. 330. But *contra*, Isenhart *v.* Brown, 2 Edw. 341; Adams *v.* Adams, 10 Leigh 527.

([d]) Knettle *v.* Crouse, 6 Watts 123; Addams *v.* Heffernan, 9 Watts 529.

ally allowed on the overdue coupons of a coupon bond, though they are obligations for the payment of interest.(a) It was thought necessary in the earlier cases to prove a demand for payment and refusal,(b) or at least that there was no money at the place of payment to pay the coupons;(c) but it is now held that interest will be allowed, without proof of presentment. The debtor can avoid the payment of interest only by proving that the money to pay the coupons was ready at the time and place of payment.(d) Where a coupon bond was converted by the defendant, it was held that interest on the coupons could be recovered by the owner from the times they were payable.(e)

Since after the maturity of the obligation, interest, though secured by the obligation, accrues as damages, no interest can be recovered on account of the non-payment

(a) Gelpcke *v.* Dubuque, 1 Wall. 175; Aurora *v.* West, 7 Wall. 82; Clark *v.* Iowa City, 20 Wall. 583; Genoa *v.* Woodruff, 92 U. S. 502; Amy *v.* Dubuque, 98 U. S. 470; Koshkonong *v.* Burton, 104 U. S. 668; Pana *v.* Bowler, 107 U. S. 529; Rich *v.* Seneca Falls, 19 Blatch. 558; Fauntleroy *v.* Hannibal, 5 Dill. 219; Hollingsworth *v.* Detroit, 3 McLean 472; Huey *v.* Macon County, 35 F. R. 481; Harper *v.* Ely, 70 Ill. 581; Humphreys *v.* Morton, 100 Ill. 592; Jeffersonville *v.* Patterson, 26 Ind. 15; Forstall *v.* Louisiana Planters' Assoc., 34 La. Ann. 770; Virginia *v.* Ches. & Ohio Canal Co., 32 Md. 501; Welsh *v.* First Div. of St. P. & P. R.R. Co., 25 Minn. 314; Conn. Mut. Life Ins. Co. *v.* C. C. & C. R.R. Co., 41 Barb. 9; Burroughs *v.* Richmond County, 65 N. C. 234; McLendon *v.* Anson County, 71 N. C. 38; Dunlap *v.* Wiseman, 2 Disney 398; North P. Ry. Co. *v.* Adams, 54 Pa. 94; Langston *v.* S. C. Ry. Co., 2 S. C. 248; Nashville *v.* First Nat. Bank, 1 Baxt. 402; San Antonio *v.* Lane, 32 Tex. 405; Arents *v.* Com., 18 Gratt. 750, 776; Gibert *v.* Washington C. V. M. & G. S. R.R. Co., 33 Gratt. 586, 598; Mills *v.* Jefferson, 20 Wis. 50. But *contra*, Rose *v.* Bridgeport, 17 Conn. 243; Force *v.* Elizabeth, 28 N. J. Eq. 403.

(b) Phelps *v.* Lewiston, 15 Blatch. 131; Beaver County *v.* Armstrong, 44 Pa. 63; Whitaker *v.* Hartford P. & F. R.R. Co., 8 R. I. 47; Nat. Exchange Bank *v.* Hartford P. & F. R.R. Co., 8 R. I. 375.

(c) Nashville *v.* First Nat. Bank, 1 Baxt. 402.

(d) Walnut *v.* Wade, 103 U. S. 683; Humphreys *v.* Morton, 100 Ill. 592.

(e) Winona *v.* Minnesota Ry. C. Co., 29 Minn. 68.

of stipulated interest after the maturity of the obligation, and no interest can be recovered for delay in paying interest on the overdue instalments of interest. Consequently at the maturity of the obligation interest runs upon the amount of the obligation itself with the interest secured by it and unpaid; the additional amount due as damages for non-payment of the stipulated interest does not bear interest, even after maturity of the obligation.[a] Even if the obligation provides that if the interest is not promptly paid it shall become principal and bear interest like the principal, no interest can be recovered on arrears of this secondary interest;[b] for it is interest payable after maturity, and by way of damages. In short, *compound* interest is never allowed by way of damages; but interest is allowed upon unpaid interest which is a part of the debt.

§ 346. **Interest in admiralty.**—In admiralty proceedings interest is in the discretion of the court. In The Wanata[c] it was held the libellants could recover interest, on the costs and damages, against the stipulators for value, by way of damages for the delay, as the amount should have been paid before the appeal was taken.

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[a] Wheaton *v.* Pike, 9 R. I. 132.
[b] Vaughan *v.* Kennan, 38 Ark. 114; Bledsoe *v.* Nixon, 69 N. C. 89.
[c] 95 U. S. 600.

CHAPTER XI.

EXEMPLARY DAMAGES.

§ 347. Meaning of the term.
348. Origin of the doctrine of exemplary damages.
349. Original position of the jury in the assessment.
350. Evolution of the doctrine.
351. History of the doctrine in America.
352. American cases.
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354. The rule established by authority and convenience.
355. Exemplary damages in other systems of law.
356. Exemplary damages and damages for mental suffering.
357. Exemplary damages in addition to compensation.
358. In some jurisdictions, exemplary damages not awarded.
359. In some jurisdictions, exemplary damages, so called, are compensatory.
360. In most jurisdictions exemplary damages are given for punishment.
361. Exemplary damages not allowed without actual loss.
362. Do not survive.
363. Are allowed only for wilful injury.
364. Exemplary damages for malice.
365. For oppression, brutality, or insult.
366. For wantonness of injury.
§ 367. For fraud.
368. For gross negligence.
369. Circumstances preventing the allowance of exemplary damages.
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371. Not recoverable in equity.
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382. Of one of two joint defendants.
383. Mitigation or aggravation—Want of malice.
384. Provocation.
385. Pecuniary condition of defendant.
386. Exemplary damages for injuries which are crimes.
387. Relations of court and jury in awarding exemplary damages.
388. Power of jury over amount of exemplary damages.

§ 347. **Meaning of the term.**—In actions of tort, when gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation,

but may, by a severer verdict, at once impose a punishment on the defendant, and hold him up as an example to the community. It might be said, indeed, that the malicious character of the defendant's intent does, in fact, increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation; but it will appear from the cases we now proceed to examine that the idea of compensation is abandoned, and that of punishment introduced. Damages assessed upon this principle are called "exemplary" or "vindictive" damages.(a)

§ 348. **Origin of the doctrine of exemplary damages.**—The term "exemplary damages" seems to have owed its origin to Lord Camden, the first reported case in which it occurs being that of Huckle *v.* Money,(b) one of the general warrant cases. It can hardly be said that the decisions in this case and those which are cited as following it established a new rule of damages. They were, on the contrary, cases where the court held to old precedent in the face of hard pressure to establish a novel doctrine. To understand this, it is only necessary to recall the original position of the jury in the assessment of damages.

§ 349. **Original position of the jury in the assessment of damages.**—Until comparatively recent times juries were

(a) Other terms sometimes used are "punitory" or "punitive" damages, and "smart money." These terms are usually employed indifferently in describing these damages. Hackett *v.* Smelsley, 77 Ill. 109; Roth *v.* Eppy, 80 Ill. 283; Chiles *v.* Drake, 2 Met. (Ky.) 146; Louisville & P. R.R. Co. *v.* Smith, 2 Duvall 556; Stoneseifer *v.* Sheble, 31 Mo. 243; Kennedy *v.* North Missouri R.R. Co., 36 Mo. 351; Green *v.* Craig, 47 Mo. 90. In Freese *v.* Tripp, 70 Ill. 496; Meidel *v.* Anthis, 71 Ill. 241; Freidenheit *v.* Edmundson, 36 Mo. 226; McKeon *v.* Citizens' R.R. Co., 42 Mo. 79, it was attempted to make a distinction between "exemplary" and "punitory" damages; but the cases were soon overruled.

(b) 2 Wils. 205; Sayer on Damages, 220.

as arbitrary judges of the amount of damages as of the facts. The court could review the finding of the jury only in cases of mayhem, and then it must be *super visum vulneris.*[a] The parties, by putting themselves upon the country, had agreed to abide by its decision. Thus, the jury having awarded enormous damages in an action of *scandalum magnatum*, the court was asked for a new trial. In refusing to grant this, North, C. J., said: "In *civil actions* the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof." [b] This principle applied as well to actions of contract as to actions of tort. And in an action against an attorney for negligence, "the jury were told they might find what damages they pleased." [c] Even as late as the time of Lord Mansfield it was possible for counsel to state the law to be that "The court cannot measure the ground on which the jury find damages that may be thought large; they may find upon facts within their own knowledge. And in order to enable them to do this, it was that the old common-law writ appointed them to be *de vicenet.* Twelve jurors are not to be supposed to give a verdict contrary to their conscience, and both parties put themselves upon the jury to abide their decision, as to the quantity of the damages, as well as whether any or not." [d] At the end of the eighteenth century, however, the present law regulating the measure of damages was settled so far as it concerned actions of contract; and in actions of tort where the injury was to property only, there seems to have been an approach to fixed principles of compensation. But

[a] Hawkins *v.* Sciet, Palm. 314; Staneley's Case, Hetl. 93, Lit. 150; Delves *v.* Wyer, Brownl. 204.

[b] Townsend *v.* Hughes, 2 Mod. 150.

[c] Russel *v.* Palmer, 2 Wils. 325.

[d] Gilbert *v.* Berkinshaw, Lofft, 771.

where personal suffering or outraged feelings complicated the estimate of damages, the court still held itself incompetent to review the verdict of the jury. The doctrine of exemplary damages is thus seen to have originated in a survival in this limited class of cases of the old arbitrary power of the jury.

§ 350. **Evolution of the theory of exemplary damages.**— It remains to consider the steps by which the rule of exemplary damages acquired its present form. As has already been said, nothing was further from the idea of the judges than that they were establishing a new doctrine; they founded their decision entirely on existing precedents.

The case generally cited as establishing the rule was, as has been already stated, an action of trespass, assault and imprisonment, the act complained of being an arrest of the plaintiff as printer of the "North Briton," under a general warrant issued by Lord Halifax, then Secretary of State, no actual ill-treatment being alleged, the jury having found a verdict for £300; on a motion for a new trial on the ground of excessive damages, Lord Chief Justice Pratt, afterwards Lord Camden, said:

"The personal injury done to the plaintiff was very small; so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law, touching the liberty of the subject, appeared to them at the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating *magna charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the solicitor of the treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the

ideas which struck the jury on the trial ; and I think they have done right in giving exemplary damages. I cannot say what damages I should have given if I had been upon the jury ; but I directed and told them they were not bound to any certain damages, against the solicitor-general's argument." [1]

And the motion for a new trial was denied. The same case, as reported in Sayer on Damages,([a]) contains a further extract from the opinion of the Chief Justice : "Whenever an injury is done under the color of authority, as if an officer empowered to press exceed the authority given him by the press warrant ; or if a master of a ship abuse the power by law vested in him over the sailors under his command ; or if, as in the present case, a person is arrested upon a general warrant, the jury in assessing damages are not confined to the damages which have been actually sustained, but ought to assess exemplary damages." By the concurring opinion of Bathurst, J., it clearly appears that in his opinion the decision was only a refusal to restrict the jury to certain damages.

Beardmore *v.* Carrington ([b]) was an action also growing out of these general warrants, where a verdict was found for the plaintiff in £1,000. As he had been imprisoned but six days a motion was made for a new trial, on the ground of the excessiveness of the damages. But it was refused. Lord Campbell, in his *Lives of the Chancellors*, vol. v, p. 249, reports Lord Chief Justice Pratt to have said : "As to the damages, I continue of opinion that the jury are not limited to the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as a proof of the detestation in which the wrongful act is held by the jury." But this language can-

[1] Huckle *v.* Money, 2 Wils. 205.

([a]) At p. 220.

([b]) 2 Wils. 244.

not be found in the case as reported by Wilson. On the contrary, it is clear that the case was another refusal of the court to set aside the verdict of the jury, and that their reason was the lack of the court's power to do so. They cited Townsend *v.* Hughes in support of their decision; and said: "We desired to be understood that this court does not say, or lay down any rule that there can never happen a case of such excessive damages in *tort*, where the court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush."([a])

In a later case the plaintiff brought an action for a blow on the face given him by the defendant. Pratt, C. J., said: "As a challenge and death may be the consequence of a blow given by one gentleman to another, I think the jury, who are in all cases the proper judges of damages, have done right in the present case in giving exemplary damages."([b])

In an action of trespass for entering the plaintiff's house and debauching his daughter, soon after decided, expressions were thrown out in passing which might give countenance to the doctrine. Thus on a motion for a new trial on the ground that the damages were excessive, Wilmot, Lord Chief Justice, said: "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."[1] That the court, however, desired as far as possible to reconcile this view with the rule of compensation appears from the opinion of Bathurst, J., who

[1] Tullidge *v.* Wade, 3 Wils. 18.

([a]) At p. 250.

([b]) Grey *v.* Grant, C. B., Trin. 4 Geo. III.; Sayer on Damages, 227.

said: "In actions of this nature, and of assaults, the circumstances of time and place, when and where the insult is given, require different damages, as it is a greater insult to be beaten upon the *Royal Exchange* than in a private room."

* In an action in the English Common Pleas, of trespass *quare clausum fregit*, it appeared that the plaintiff, a gentleman of fortune, was shooting on his own estate, when the defendant, a banker, magistrate, and member of parliament, forced himself on the plaintiff's land, fired at game several times, and used very intemperate language. The jury found a verdict for £500; and on a motion to set it aside for excess, Gibbs, C. J., said:

"I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low station of life who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes, and walks up and down before the window of his house, and looks in while the owner is at his dinner; is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the mischief I have done'? Would that be a compensation? I cannot say that it would be."

And Heath, J., said:

"I remember a case where the jury gave £500 damages, for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages."[1]

[1] Merest *v.* Harvey, 5 Taunt. 442.

In a case in the King's Bench, which was trespass for breaking the plaintiff's close, and laying poison upon it to destroy the plaintiff's poultry, the defendant contended that he was only liable for the value of the fowls destroyed; but Abbott, J., told the jury that they might consider not only the mere pecuniary damage, but also the intention, whether for insult or injury, and the verdict was £50.[1] So, the Court of Exchequer has said:[2] "In actions for malicious injuries, juries have been allowed to give what are called vindictive damages, and to take all the circumstances into consideration." So, in the Exchequer Chamber, Lord Denman said, that the actions of trespass of real and personal property were an extension of that protection which the law throws around the person, and that substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred.[3] **

§ 351. **History of the doctrine in America.**—The rule was very early established in several jurisdictions of this country. Thus in New Jersey, in an action for breach of promise of marriage brought at the end of the last century, the jury was charged "that they were not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offences in future."(a) So in New York, * in an action for libel, it was urged on a motion for a new trial, that the public character of the plaintiff as an officer of government, and the evil example of libels, were stated by the judge to the jury, as considerations with them for increasing the damages; but Kent, C. J., delivering the opinion of the

[1] Sears *v.* Lyons, 2 Stark. 317.
[2] Doe *v.* Filliter, 13 M. & W. 47.
[3] Rogers *v.* Spence, 13 M. & W. 571. See, also, Williams *v.* Currie, 1 C. B. 841.

(a) Coryell *v.* Colbaugh, Coxe 77.

Supreme Court said: "Surely this is the true and salutary doctrine. The actual pecuniary damages in actions for defamation, as well as in other actions for torts, can rarely be computed, and are never the sole rule of assessment." And after reviewing the English cases, the court proceeded: "But it cannot be requisite to multiply instances in which the doctrine contained in this part of the charge has received the sanction of the English and of the American courts of justice. It is too well settled in practice, and is too valuable in principle, to be called in question." Spencer, J., held still stronger language: "In vindictive actions," he said, "such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury that they are to inflict damages for example's sake, and by way of punishing the defendant."[1]

So again, in another case,[2] where trespass was brought for beating a horse to death, the judge charged, that if they found for the plaintiff, it was a case in which, from the wantonness and cruelty of the defendant's conduct, the jury had a right to give smart money. A verdict was found for $75. A motion was made to set aside the verdict, for misdirection and for excessive damages; but the Supreme Court of New York said: "Great barbarity was proved on the part of the plaintiff; we think the charge of the judge was correct, and should have been better satisfied with the verdict if the amount of damages had been greater and more exemplary"; and the motion was denied.**

So in Pennsylvania a sheriff was held liable in exemplary damages for the act of his deputy;(a) and it was

[1] Tillotson *v.* Cheetham, 3 Johns. 56, 64 (1808).

[2] Woert *v.* Jenkins, 14 Johns. 352.

(a) Hazard *v.* Israel, 1 Binn. 240 (1808).

afterwards laid down as a general rule that with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights, the jury are at liberty to give vindictive or exemplary damages.[1]

These authorities were followed by such a multitude of cases that the principle became by the middle of the present century, as fully established by weight of authority as any doctrine of the law. In the first edition of this treatise, the doctrine was recognized as so established; and this opinion, in the face of the ablest and most persistent opposition, has prevailed.

§ 352. **American cases.**—*The principle was recognized on the Massachusetts circuit, by Mr. Justice Story,[2] who said:

"In cases of marine torts, or illegal captures, it is far from being uncommon in the Admiralty to allow costs and expenses, and to *mulct the offending parties, even in exemplary damages,* when the nature of the case requires it. Courts of Admiralty allow such items, not technically as costs, but on the same principle as they are often allowed damages in cases of torts by courts of common law, as a recompense for injuries sustained, as *exemplary damages*, or as a remuneration for expenses incurred, or losses sustained, by the misconduct of the other party."

So, again, the same learned judge, on the Maine circuit, in an action for malicious prosecution, used this language: "If, in the present case, there was, on the part of the defendant, a want of probable cause; yet, if he acted under a mistaken sense of duty and without any intention of oppression, it was, at most, a case for *compensatory* and not for *vindictive* damages."[3] So in Connecticut, in an action on the case for gross negligence, it was said by Church, J., in delivering the opinion of the

[1] Phillips *v.* Lawrence, 6 W. & S. 150.

[2] Boston Manuf. Co. *v.* Fiske, 2 Mason 119.

[3] Wiggin *v.* Coffin, 3 Story 1, 11.

Supreme Court of Errors: "There is no principle better established and no practice more universal than that *vindictive damages or smart money* may be and is awarded by the verdict of juries, and whether the form of the action be trespass or case."[1] So in Pennsylvania, Gibson, J., delivering the opinion of the court, said: "In cases of personal injury, damages are given not to compensate but to punish."[2]

So in a case of marine trespass, brought against the owners of a privateer for an illegal seizure, the Supreme Court of the United States said:

"This is a case of gross and wanton outrage. The honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer; they are innocent of the demerit of the transaction. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages."[3]

So in Connecticut, it has been said, that in actions for injuries to personal property, "the jury are not restricted to the pecuniary loss of the plaintiff."[4]

In Alabama it has been said, in reference to the action for malicious prosecution, that "the common law in such case allows the jury, if they choose, to make an example of the defendant when sued for redress, and will

[1] Linsley *v.* Bushnell, 15 Conn. 225, 236; Huntley *v.* Bacon, 15 Conn. 267.

[2] Pastorius *v.* Fisher, 1 Rawle 27; but it is to be noticed that the remark is *obiter*.

[3] Story, J., in the Amiable Nancy, 3 Wheaton 546, 558.

[4] Merrills *v.* Tariff Man'g Co., 10 Conn. 384.

allow them to go beyond the actual damage the party has sustained."[1]

In New York the general rule has been repeatedly declared. So, in an action for libel, it was said by the chancellor, in the Court of Errors: "The jury may not only give such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages by way of punishment to the defendants. This is usually denominated exemplary damages, or smart money."[2] The subject was again examined in the same State, and the general principle very clearly stated. It was an action for assault and battery, where it was insisted that the fact that the defendant had been punished criminally for the offense should be received in evidence to mitigate damages in the civil suit. The court held otherwise, saying:

"In vindictive actions, and this is agreed to come within that class, jurors are always authorized to give exemplary damages, where the injury is attended with circumstances of aggravation; and the rule is laid down without the qualification, that we are to regard either the possible or the actual punishment of the defendant by indictment and conviction at the suit of the people. . . . . We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally compensatory for damages, and at the same time answers the purposes of punishment."[3]

And again, in the Court of Errors of the same State, Mr. Senator Strong said: "In aggravated cases of this nature, are not jurors daily charged to give such damages as shall not only remunerate the plaintiff, but operate as

[1] Donnell *v.* Jones, 13 Ala. 490, 502.
[2] King *v.* Root, 4 Wend. 113, 139.
[3] Cook *v.* Ellis, 6 Hill 466; see, also, Tifft *v.* Culver, 3 Hill 180; Auchmuty *v.* Ham, 1 Denio 495; and Brizsee *v.* Maybee, 21 Wend. 144, where it is suggested the jury may give smart money in replevin.

a punishment to the defendant—as shall deter him and others in like cases offending, from the perpetration of similar enormities?"[1]

In an exceedingly well reasoned case on the Pennsylvania circuit, Mr. Justice Grier said:

"It is a well-settled doctrine of the common law, though somewhat disputed of late, that a jury, in actions of trespass or tort, may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of the defendant's conduct rather than compensation to the plaintiff. Indeed, in many actions, such as slander, libel, seduction, etc., there is no measure of damages by which they can be given as compensation for an injury, but are inflicted wholly with a view to punish and make an example of the defendant."[2]

So, also, it has been said in Illinois: "In vindictive actions the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrong-doer."[3] So, again, in an action of trespass for assault and battery, it was said: "In this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant."[4] **

In the Supreme Court of the United States, Mr. Justice Grier, in delivering the opinion of the court, laid down the following rule:

"It is a well-established principle of the common law, that in actions of trespass, and in all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for

[1] Burr *v.* Burr, 7 Hill 207, 217; and see the rule very strongly laid down, in cases of slander of title, in Kendall *v.* Stone, 2 Sandf. 269.

[2] Stimpson *v.* The Railroads, 1 Wallace, Jr. 164, 170.

[3] Grabe *v.* Margrave, 4 Ill. 373; see, also, Johnson *v.* Weedman, 5 Ill. 495.

[4] McNamara *v.* King, 7 Ill. 432, 436.

more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury; as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." (a)

In the case of Voltz *v.* Blackmar,(b) the plaintiff brought an action for false imprisonment. The jury were told that they might "award damages to any extent by way of punishment to the defendant, and as a warning to others against committing like offenses." This was held to be correct, Andrews, J., saying:

"In vindictive actions, as they are sometimes termed, such as libel, assault and battery, and false imprisonment, the conduct and motive of the defendant is open to inquiry, with a view to the assessment of damages; and if the defendant, in committing the wrong complained of, acted recklessly, or wilfully and maliciously, with a design to oppress and injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation, and beyond that may, as a punishment to the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper. The same rule has been

(a) Day *v.* Woodworth, 13 How. 363, 371. (b) 64 N. Y. 440, 444.

held to apply in the case of a wilful injury to property, and in actions of tort founded upon negligence, amounting to misconduct and recklessness."

§ 353. **Objections to the doctrine.**—The foremost place on the negative side of the discussion was taken by Professor Greenleaf in a familiar passage in his treatise on Evidence.(a) Later, one of the ablest judges of the Supreme Court of New Hampshire, in an exhaustive opinion overruling former decisions of that court, held that exemplary damages could not be recovered.(b) The Supreme Court of New Jersey has characterized the doctrine graphically as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine."(c) The opponents of the doctrine have maintained, what is perfectly true, that it is an exceptional or anomalous doctrine, at variance with the general rule of compensation; hence that, logically, it is wrong.

Again, it is urged that the practice of giving damages in order to punish the defendant is an unjust one. The two chief reasons given are—first, the defendant is deprived of his right to have the offense proved beyond a reasonable doubt, as should be done if he is to be punished for it; second, the amount of his punishment is left entirely to the mercy of a jury, untrained in determining the amount of punishment, who may assess, and frequently do assess, the damage at a sum far greater than the fine provided by law as a proper punishment for the act, considered as a criminal offense. Many jurisdictions restrict the allowance of exemplary damages to cases where the defendant's act is not a crime; but this allows the jury to decide that to be worthy of

(a) 14th ed., vol. ii., § 253 n.
(b) Foster, J., in Fay *v.* Parker, 53 N. H. 342.
(c) Haines *v.* Schultz, 50 N. J. L. 481.

punishment which the State in its legislative capacity has not deemed it best to punish. Objections such as these have led to strong attempts to give the doctrine a quasi criminal basis; but these have not succeeded. Thus it has been held that the circumstances relied on to authorize exemplary damages need not be proved beyond a reasonable doubt,(a) and that the liability to exemplary damages and a criminal prosecution is not double jeopardy.(b) In the words of Ryan, C.J.: "Considered as strictly punitory, the damages are for the punishment of the private tort, not of the public crime." (c)

The opponents of the rule have attempted to explain away the authorities in its favor in a variety of ways, but without much success. It may be admitted that in many cases damages have been called exemplary which might have been granted as compensatory damages for mental suffering; but the fact remains that damages were granted in these cases *in pœnam*. A vast body of decisions exists, in which the recovery could only be *in pœnam;* and the inquiry is always made, not as to the effect of the defendant's malice, but as to its motive. As the Supreme Court of North Carolina has well said, the inquiry is as to "the extent of the injury intended, and not that which was really inflicted."(d)

§ 354. **The rule established by authority and convenience.** —Upon the whole, the doctrine is to be supported (except in those few jurisdictions which have repudiated it) mainly upon the grounds of authority and convenience. The historical facts already referred to show that it has its roots in that jealousy of the exercise of arbitrary and

(a) St. Ores *v.* McGlashen, 74 Cal. 148.
(b) See § 386.
(c) Brown *v.* Swineford, 44 Wis. 282.
(d) Gilreath *v.* Allen, 10 Ired. 67.

malicious power, to which the jury in our system of law has always been so keenly alive ; and if it is an anomalous survival of a part of the old rule that the jury were judges of the damages, it must be inferred that it has survived because of its inherent usefulness. Many anomalies which have far less authority behind them must be supported on this ground, and no anomaly supported by both authority and convenience can be eradicated simply by showing it to be illogical. The idea that it is unjust rests upon the assumption that there is something unfair in allowing the plaintiff's damages to be enhanced on account of the defendant's intent, but it is to be said in reply to this that although the intent cannot make a wrongful act *more wrongful*, it may make the consequences of it much more serious, and of the extent of these consequences the jury is the judge and the only possible judge. In support of this view the reasoning of the early cases seems thus far to have been convincing. It should be observed in conclusion that even in jurisdictions which discountenance the doctrine, juries are allowed to give, under the title of damages to feelings, verdicts quite as substantial as any which could be recovered under the head of exemplary damages. Hence it is not open to the opponents of exemplary damages to contend that the practical results of the application of the rule work any injustice, or that the rule bears more heavily upon the wrong-doer than the substitute of which they are advocates. In either case it is the jury and not the court which practically decides how much the plaintiff may recover.

§ 355. **Exemplary damages in other systems of law.**—* In the Roman and Civil Law exemplary damages seem to have been unknown. In Scotland the principle of compensation seems rigidly adhered to, even in cases of flagrant wrong. So, in an action of damages for defa-

mation, sending a challenge, assault, and threatened battery, the Lord Chief Commissioner Adam, one of the most eminent judges of the present century, said: "In all cases of damage, a fair, unprejudiced discussion (*avoiding in civil cases the converting compensation for a civil injury into a matter of punishment*) will lead to a rational, conscientious, and fair compromise of your different opinions, and bring you to fix on one sum"; and the reporter adds: "In all cases of this sort, his lordship has been in the habit of repeating this doctrine."[1]

Again, in an action for defamation, the Lord Chief Commissioner said: "The question of damages, in case of an attack on the character of a professional man, must always include both a question of loss and *solatium*. You must consider it *as a question of reparation, not of punishment;* but if a person of perfectly pure character is assailed in this manner, you will consider whether a rich man ought not to pay a little more."[2] The same rule was laid down by the same judge in actions of *crim. con.* In Baillie *v.* Bryson,[3] an action of this class, the Lord Chief Commissioner said: "I cannot help thinking that Lord Kenyon introduced into cases of this sort a principle, as to damages, extremely dangerous in its consequences. He considered such questions, not merely as calculated to *repair the injury* done to the one party, but *as a punishment of the* other, and as intended to correct the morals of the country. The morals of the country have not been improved, and I am afraid its feeling has been much impaired. A civil court in matters of civil injury is a bad corrector of morals; it has only to do with the rights of parties." **(a)

[1] Hyslop *v.* Staig, 1 Murr. 15, 24.
[2] Christian *v.* Lord Kennedy, 1 Murr. 419, 428.
[3] 1 Murr. 317, 337.

(a) It would seem that the introduction of Lord Kenyon's name in this

§ 356. **Exemplary damages and damages for mental suffering.**—It will at once appear that circumstances of aggravation, such as give rise to exemplary damages, are frequently, if not generally, of a nature to cause additional loss to the plaintiff of an intangible sort, such as mental suffering or loss of reputation. As Foster, J., points out in Fay *v.* Parker,(a) the earliest cases cited as allowing exemplary damages were of this sort; the court refused to set aside the large verdicts found by the jury, on the ground of the impossibility of saying that the jury had estimated this element of loss too highly. But the doctrine of exemplary damages as established has no relation to the suffering of the plaintiff.

The allowance of exemplary damages gave rise for a time to the notion that mental suffering is not a subject for compensatory damages. This notion has been generally abandoned; in Massachusetts, where exemplary damages are not allowed, the right to recover damages for mental suffering has always been recognized.

§ 357. **Exemplary damages in addition to compensatory.**—The similarity between exemplary damages and damages for wounded feelings has been noticed by the Supreme Court of Wisconsin, in the case of Brown *v.* Swineford.(b)

"The distinction between compensatory damages for wounded feeling, sense of insult, etc., and punitory damages is sometimes very vague. . . . . And the vagueness of this distinction, in prac-

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connection is a mistake. In the only reported case to be found where the subject of excessive damages was discussed by him, he follows the language of the older cases, and refuses to set aside a verdict on the ground that in actions of tort the court cannot control the jury. There is not in his opinion a hint of the right to punish the defendant. Duberley *v.* Gunning, 4 T. R. 651. Lord Camden is probably meant.

(a) 53 N. H. 342.

(b) 44 Wis. 282, 289, *per* Ryan, C. J.

tice as well as in theory, is illustrated by the three reports of Bass *v.* Railway Co.(a) The case was three times tried in different counties, twice upon instructions allowing exemplary damages, and once upon instructions disallowing them. And yet the verdict on each trial was for the same sum. Apparently what was allowed on two trials for exemplary damages was allowed on the third trial for compensatory damages for wounded feelings, etc."

In spite of this similarity, however, the two sorts of damage are quite distinct. Damages for wounded feelings are compensatory in their nature, and are given, as has been seen, in all cases where the allowance is proper. Exemplary damages are given because of the motive of the defendant, and it is well settled that when they are allowed it is in addition to compensatory damages for either physical or mental suffering.(b)

§ 358. **In some States exemplary damages are not awarded.**—As has been said, the doctrine of exemplary damages has never been recognized in Massachusetts.(c) In that State the "manner and manifest motive" of a tort may be shown, as tending to prove mental suffering.(d) In Hawes *v.* Knowles,(e) Gray, C. J., said: "In an action of tort for a wilful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages; for when the merely physical injury is the same, it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff, than if it is

(a) 36 Wis. 450; 39 Wis. 636; 42 Wis. 654.

(b) Harrison *v.* Ely, 120 Ill. 83; Parkhurst *v.* Masteller, 57 Ia. 474; Root *v.* Sturdivant, 70 Ia. 55; Haines *v.* Schultz, 50 N. J. L. 481; Hamilton v. Third Avenue R.R. Co., 35 N. Y. Super. Ct. 118; Craker *v.* Chicago & N. W. Ry. Co., 36 Wis. 657.

(c) Spear *v.* Hubbard, 4 Pick. 143, 145; Sampson *v.* Henry, 11 Pick. 379, 388; Barnard *v.* Poor, 21 Pick. 378.

(d) Smith *v.* Holcomb, 99 Mass. 552; Hawes *v.* Knowles, 114 Mass. 518.

(e) 114 Mass. 518.

the result of mere carelessness"; and it was held that the wantonness must be such as to cause additional pain to the plaintiff in body or mind. The same decision denying exemplary damages has been given in the new States of Colorado and Nebraska, where the court, treating the question as *res integra*, followed the Massachusetts decisions on principle.[a] In New Hampshire the same result has been reached by overruling earlier cases allowing exemplary damages.[b]

In Wilson *v.* Bowen [c] the Supreme Court of Michigan said: "The purpose of an action of tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant; *compensation* to the plaintiff is the purpose in view; and, when that is accorded, anything beyond, by whatever name called, is unauthorized. It is not the province of the jury, after *full* damages have been found for the plaintiff, so that he is fully *compensated* for the wrong committed by the defendant, to mulct the defendant in an additional sum, to be handed over to the plaintiff as a *punishment* for the wrong he has done to the plaintiff."

§ 359. **In some States exemplary damages, so-called, are in fact compensatory.**—In West Virginia exemplary damages so-called are allowed; but they are distinctly held to be compensatory damages, "indeterminate" damages, as the court calls them.[d] The court divides damages into "determinate" damages, those for which there is an easily ascertained pecuniary measure, and "indeterminate"

(a) Murphy *v.* Hobbs, 7 Col. 541; Greeley, St. L. & P. Ry. Co. *v.* Yeager, 11 Col. 345; Riewe *v.* McCormick, 11 Neb. 261.

(b) Fay *v.* Parker, 53 N. H. 342; Bixby *v.* Dunlap, 56 N. H. 456.

(c) 64 Mich. 133, 141, *per* Champlin, J.; following Stilson *v.* Gibbs, 53 Mich. 280.

(d) Pegram *v.* Stortz, 31 W. Va. 220; Beck *v.* Thompson, 31 W. Va. 459.

damages, given for non-pecuniary loss, such as physical or mental pain or loss of reputation. Both classes of damages may be recovered, the court held, the latter under the name "exemplary" damages: but no damages can be recovered *in pœnam*.[a] Consequently though by the Civil Damage Act a wife was allowed to recover exemplary damages from one selling liquor to her husband, this was held to mean compensation for mental anguish.[b]

The doctrine of the West Virginia court appears to be law also in Nevada [c] and Wyoming.[d] In Lower Canada, a State deriving its jurisprudence from the Civil Law, the rule seems to be the same.[e] Damages have been allowed, called "exemplary" ("dommages exemplaires" as distinguished from "dommages réels"); but they are apparently compensatory damages for pain,[f] mental suffering,[g] or loss of reputation.[h]

In Texas a peculiar rule obtains. Exemplary damages seem to be regarded as compensatory, but as an award of compensation for losses which in ordinary cases are not to be compensated. The ordinary rules restricting com-

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[a] The court followed the common authorities on exemplary damages, and as a result held that "indeterminate" damages are allowed only in case of an injury inflicted with vicious intention. Such losses are more likely to result from a wilful tort; but they may also result from a well-intended or even an involuntary act, and they are then to be compensated. This is notably true in the case of physical suffering, which may be compensated as well in an action for negligence as in an action for wilful trespass; but it is equally true in some cases of mental suffering. Chapman, C. J., in Smith *v.* Holcomb, 99 Mass. 552, 554.

[b] Pegram *v.* Stortz, 31 W. Va. 220.

[c] Quigley *v.* Central P. R.R. Co., 11 Nev. 350.

[d] Union P. R.R. Co. *v.* Hause, 1 Wyo. 27.

[e] See, however, Guest *v.* Macpherson, 3 Leg. News, 84, where damages are divided into three sorts: nominal, compensatory, and punitive.

[f] Falardeau *v.* Couture, 2 L. C. J. 96.

[g] Mathieu *v.* Laflamme, 4 R. L. 371.

[h] Brossoit *v.* Turcotte, 20 L. C. J. 141.

pensation to proximate and natural loss are relaxed, and litigation expenses are also recovered. Thus where the injury was wilful and malicious, damages (called exemplary) are allowed for mental anguish, for counsel fees, and for loss of credit in an action for the destruction of property ([a]) or for a wrongful attachment.([b]) But it is doubtful if in any case the damages can exceed compensation for the plaintiff's actual loss.([a])

In some States the jury is allowed to consider the expenses of litigation in assessing exemplary damages.([c]) This doctrine is similar to that held in Texas, though it does not go so far. Such damages are plainly compensatory, and have no proper connection with damages given for punishment.

§ 360. In most States exemplary damages are given for punishment.—In most jurisdictions it is settled that exemplary damages, as a warning to other wrong-doers and as a punishment to the defendant, may be recovered in addition to compensatory damages.([d]) The authorities

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([a]) International & G. N. R.R. Co. *v.* Telephone & Telegraph Co., 69 Tex. 277.

([b]) Biering *v.* First Nat. Bank of Galveston, 69 Tex. 599.

([c]) Marshall *v.* Betner, 17 Ala. 833; Patton *v.* Garrett, 37 Ark. 605 (*semble*); Huntley *v.* Bacon, 15 Conn. 267; Ives *v.* Carter, 24 Conn. 392; Beecher *v.* Derby Bridge Co., 24 Conn. 491; St. Peter's Church *v.* Beach, 26 Conn. 355; Dibble *v.* Morris, 26 Conn. 416; Platt *v.* Brown, 30 Conn. 336; Welch *v.* Durand, 36 Conn. 182; Dalton *v.* Beers, 38 Conn. 529; Mason *v.* Hawes, 52 Conn. 12; Bennett *v.* Gibbons, 55 Conn. 450; Wynne *v.* Parsons, 57 Conn. 73; Titus *v.* Corkins, 21 Kas. 722; Winstead *v.* Hulme, 32 Kas. 568; Eatman *v.* New Orleans P. Ry. Co., 35 La. Ann. 1018; Northern, J. & G. N. R.R. Co. *v.* Allbritton, 38 Miss. 243; Roberts *v.* Mason, 10 Oh. St. 277; Finney *v.* Smith, 31 Oh. St. 529; Stevenson *v.* Morris, 37 Oh. St. 10; Peckham Iron Co. *v.* Harper, 41 Oh. St. 100. See § 234.

([d]) *England:* Emblen *v.* Myers, 6 H. & N. 54; Bell *v.* Midland Ry. Co., 4 L. T. (N. S.) 293. *United States:* Day *v.* Woodworth, 13 How. 363; Milwaukee & St. P. Ry. Co. *v.* Arms, 10 U. S. 489; Missouri P. Ry. Co. *v.* Humes, 115 U. S. 512; Denver & R. G. Ry. Co. *v.* Harris, 122 U. S. 597; Brown *v.* Evans, 8 Sawy. 488; U. S. *v.* Taylor, 35

in Oregon leave the question doubtful. The Supreme Court of that State, in an elaborate opinion, refused to

Fed. Rep. 484. *Alabama:* Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529. *Arkansas:* Clark *v.* Bales, 15 Ark. 452; Ward *v.* Blackwood, 41 Ark. 295 (*semble*); Citizens' St. Ry. Co. *v.* Steen, 42 Ark. 321. *California* (by Code): St. Ores *v.* McGlashen, 74 Cal. 148; Waters *v.* Dumas, 75 Cal. 563; Bundy *v.* Maginess, 76 Cal. 532. *Connecticut:* Linsley *v.* Bushnell, 15 Conn. 225; Dibble *v.* Morris, 26 Conn. 416; Dalton *v.* Beers, 38 Conn. 529. *Dakota:* Bates *v.* Callender, 3 Dak. 256 (*semble*). *Delaware:* Robinson *v.* Burton, 5 Harr. 335. *District of Columbia:* Redwood *v.* M. R.R. Co., 6 D. C. 302; *Florida:* Smith *v.* Bagwell, 19 Fla. 117 (*semble*). *Georgia* (by Code): Coleman *v.* Allen, 79 Ga. 637. *Illinois:* Harrison *v.* Ely, 120 Ill. 83. *Indiana:* Binford *v.* Young, 115 Ind. 174. *Iowa:* Parkhurst *v.* Masteller, 57 Ia. 474; Root *v.* Sturdivant, 70 Ia. 55; Redfield *v.* Redfield, 75 Ia. 435; Thill *v.* Pohlman, 76 Ia. 638. *Kansas:* Wheeler & Wilson Manuf. Co. *v.* Boyce, 36 Kas. 350. *Kentucky:* Louisville & N. R.R. Co. *v.* Ballard 85 Ky. 307. *Louisiana:* Daly *v.* Van Benthuysen, 3 La. Ann. 69. *Maine:* Pike *v.* Dilling, 48 Me. 539; Webb *v.* Gilman, 80 Me. 177. *Maryland:* Baltimore & Yorktown Turnpike *v.* Boone, 45 Md. 344; Philadelphia, W. & B. R.R. Co. *v.* Larkin, 47 Md. 155. *Michigan:* McPherson *v.* Ryan, 59 Mich. 33; Ross *v.* Leggett, 61 Mich. 445; Newman *v.* Stein, 75 Mich. 402; (but see another line of decisions *contra*, Stilson *v.* Gibbs, 53 Mich. 280: Wilson *v.* Bowen, 64 Mich. 133). *Minnesota:* McCarthy *v.* Niskern, 22 Minn. 90; Peck *v.* Small, 35 Minn. 465. *Mississippi:* Vicksburg & M. R.R. Co. *v.* Scanlan, 63 Miss. 413; Higgins *v.* L. N. O. & T. R.R. Co., 64 Miss. 80. *Missouri:* Buckley *v.* Knapp, 48 Mo. 152; Joice *v.* Branson, 73 Mo. 28. *Montana:* Bohm *v.* Dunphy, 1 Mont. 333. *New Jersey:* Magee *v.* Holland, 27 N. J. L. 86; Haines *v.* Schultz, 50 N. J. L. 481. *New York:* Bergmann *v.* Jones, 94 N. Y. 51. *North Carolina:* Johnson *v.* Allen, 100 N. C. 131; Bowden *v.* Bailes, 101 N. C. 612; Knowles *v.* N. S. R.R. Co., 102 N. C. 659. *Ohio:* Atlantic & G. W. Ry. Co. *v.* Dunn, 19 St. Oh. 162; Hayner *v.* Cowden, 27 Oh. St. 292. *Pennsylvania:* Lake Shore & M. S. Ry. Co. *v.* Rosenzweig, 113 Pa. 529; Phila. Traction Co. *v.* Orbann, 119 Pa. 37. *Rhode Island:* Hagan *v.* Providence & W. R.R. Co., 3 R. I. 88 (*semble*); Von Storch *v.* Winslow, 13 R. I. 23 (*semble*); Kenyon *v.* Cameron, 17 R. I. 116. *South Carolina:* Quinn *v.* S. C. Ry. Co., 29 S. C. 381. *Tennessee:* Polk *v.* Fancher, 1 Head 336; Jones *v.* Turpin, 6 Heisk. 181; Cox *v.* Crumley, 5 Lea 529; Louisville N. & G. S. R.R. Co. *v.* Guinan, 11 Lea 98. *Vermont:* Rea *v.* Harrington, 58 Vt. 181; Camp *v.* Camp, 59 Vt. 667. *Virginia:* Borland *v.* Barrett, 76 Va. 128; Harman *v.* Cundiff, 82 Va. 239. *Wisconsin:* McWilliams *v.* Bragg, 3 Wis. 424; Spear *v.* Hiles, 67 Wis. 350. *Canada:* Gingras *v.* Desilets, Cass. Can. Dig. 116; Clissold *v.* Machell, 26 Up. Can. Q. B. 422; Silver *v.* Dom. Tel. Co., 2 R. & G. (N. Scot.) 17.

give exemplary damages in any case not required by the authorities.[a] In an earlier case exemplary damages were allowed; but the defendant's counsel conceded the point.[b] The latest case recognizes the theory as law, but refuses to allow exemplary damages on the facts.[c] In Missouri it was at one time doubtful whether exemplary damages, so-called, could ever go beyond a "good round compensation"; [d] but it is now settled that true exemplary damages may be recovered.[e]

§ 361. Exemplary damages not allowed without actual loss.—If the plaintiff has suffered no actual loss, he cannot maintain an action merely to recover exemplary damages.[f] A plaintiff has no right, the courts say, to maintain an action *merely* to inflict punishment; exemplary damages are in no case a right of the plaintiff and cannot, therefore, become a cause of action. If, however, a right of action exists, though the loss is nominal, exemplary damages may be recovered in a proper case; for the plaintiff had a right to maintain his action apart from the privilege of recovering exemplary damages.[g] So in case of a malicious trespass on land, though the actual damage is nominal, exemplary damages may be recovered.[h]

§ 362. Exemplary damages do not survive.—When the wrong-doer dies before the action is brought to trial, and

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[a] Sullivan *v.* Ore. Ry. & Nav. Co., 12 Ore. 392.

[b] Heneky *v.* Smith, 10 Ore. 349.

[c] Day *v.* Holland, 15 Ore. 464.

[d] Freidenheit *v.* Edmundson, 36 Mo. 226; McKeon *v.* C. Ry. Co., 42 Mo. 79.

[e] Buckley *v.* Knapp, 48 Mo. 152; Joice *v.* Branson, 73 Mo. 28.

[f] Meidel *v.* Anthis, 71 Ill. 241; Schippel *v.* Norton, 38 Kas. 567; Stacy *v.* Portland Pub. Co., 68 Me. 279; Ganssly *v.* Perkins, 30 Mich. 492; Robinson *v.* Goings, 63 Miss. 500; Jones *v.* Matthews, 75 Tex. 1.

[g] Wilson *v.* Vaughn, 23 Fed. Rep. 229.

[h] Hefley *v.* Baker, 19 Kas. 9.

the action is brought or continued against his executor or administrator, only compensatory damages can be recovered: the liability to exemplary damages does not survive.[a]

§ 363. **Exemplary damages are allowed only for wilful injury.**—The justification of exemplary damages lies in the evil intent of the defendant; and the allowance of such damages is therefore restricted to cases of wanton injury. There must be some wrong motive accompanying the wrongful act.[b] This has been held even in an action on a Civil Damage Act which provided expressly that the plaintiff might recover exemplary damages.[c] So where a sheriff makes a levy or an attachment in good faith on an informal process, exemplary damages cannot be recovered against him.[d] So in an action for wrongful suing out of attachment to entitle plaintiff to recover exemplary damages, there must be an intent to injure the debtor. Lack of reasonable grounds for believing allegations made to procure attachment is not enough.[e]

An accidental injury, therefore, though it may give an action, does not give grounds for exemplary damages,[f] as, for instance, an accidental trespass on the plaintiff's

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[a] Sheik *v.* Hobson, 64 Ia. 146; Edwards *v.* Ricks, 30 La. Ann. 926; Rippey *v.* Miller, 11 Ired. L. 247; Wright *v.* Donnell, 34 Tex. 291.

[b] Reeder *v.* Purdy, 48 Ill. 261; Farwell *v.* Warren, 70 Ill. 28; Toledo, W. & W. R.R. Co. *v.* Roberts, 71 Ill. 540; Miller *v.* Kirby, 74 Ill. 242; Scott *v.* Bryson, 74 Ill. 420; Becker *v.* Dupree, 75 Ill. 167; Moore *v.* Crose, 43 Ind. 30; Brown *v.* Allen, 35 Ia. 306; Tyson *v.* Ewing, 3 J. J. Marsh 185; Elliott *v.* Herz, 29 Mich. 202.

[c] Jockers *v.* Borgman, 29 Kas. 109.

[d] Dow *v.* Julien, 32 Kas. 576; Wanamaker *v.* Bowes, 36 Md. 42.

[e] Nordhaus *v.* Peterson, 54 Ia. 68.

[f] Walker *v.* Fuller, 29 Ark. 448; Tripp *v.* Grouner, 60 Ill. 474; Waller *v.* Waller, 76 Ia. 513; Jackson *v.* Schmidt, 14 La. Ann. 806; Blodgett *v.* Brattleboro, 30 Vt. 579.

land by the defendant, who believes it to be his own.[a] And an idiot or person incapable of forming an evil intent cannot be subjected to exemplary damages.[b] And where a conversion was owing to a mistake, exemplary damages were refused.[c] The mere fact that the defendant had reason to believe his act an illegal one will not necessarily make the act so wilfully wrong as to justify the infliction of exemplary damages.[d]

§ 364. **Exemplary damages for malice.**—Actual malice in the commission of a wrongful act is a cause for exemplary damages.[e]

§ 365. **For oppression, brutality, or insult.**—Oppression, brutality, or insult in the infliction of a wrong is a cause for the allowance of exemplary damages.[f] Such, for instance, is abuse of process[g] or wilful refusal to perform an official duty.[h] Where a woman in delicate health was wrongfully turned out of her house at night in a

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[a] U. S. *v.* Taylor, 35 Fed. Rep. 484; Walker *v.* Fuller, 29 Ark. 448; Ames *v.* Hilton, 70 Me. 36; Sapp *v.* N. C. Ry. Co., 51 Md. 115.

[b] McIntire *v.* Sholty, 121 Ill. 660.

[c] Tripp *v.* Grouner, 60 Ill. 474.

[d] Inman *v.* Ball, 65 Ia. 543.

[e] Ralston *v.* The State Rights, Crabbe, 22; Dibble *v.* Morris, 26 Conn. 416; Kilbourn *v.* Thompson, 1 McA. & M. 401; Sherman *v.* Dutch, 16 Ill. 283; Moore *v.* Crose, 43 Ind. 30; Louisville & N. R.R. Co. *v.* Ballard, 85 Ky. 307; Webb *v.* Gilman, 80 Me. 177; Joice *v.* Branson, 73 Mo. 28; Sowers *v.* Sowers, 87 N. C. 303; Phila. Traction Co. *v.* Orbann, 119 Pa. 37; Pittsburgh C. & S. L. Ry. Co. *v.* Lyon, 123 Pa. 140.

[f] Reeder *v.* Purdy, 48 Ill. 261; Cutler *v.* Smith, 57 Ill. 252; Smith *v.* Wunderlich, 70 Ill. 426; Drohn *v.* Brewer, 77 Ill. 280; Moore *v.* Crose, 43 Ind. 30; Jennings *v.* Maddox, 8 B. Mon. 430; L. & N. R.R. Co. *v.* Ballard, 85 Ky. 307; Webb *v.* Gilman, 80 Me. 177; Raynor *v.* Nims, 37 Mich. 34; Joice *v.* Branson, 73 Mo. 28; Bowden *v.* Bailes, 101 N. C. 612; Phila. Traction Co. *v.* Orbann, 119 Pa. 37.

[g] Huckle *v.* Money, 2 Wils. 205; Nightingale *v.* Scannell, 18 Cal. 315; Louder *v.* Hinson, 4 Jones L. 369; Rodgers *v.* Ferguson, 36 Tex. 544; Shaw *v.* Brown, 41 Tex. 446.

[h] Wilson *v.* Vaughan, 23 Fed. Rep. 229; Elbin *v.* Wilson, 33 Md. 135.

storm, she may recover exemplary damages.[a] So where a passenger was wrongfully ejected from a railroad train with rudeness and violence, he may recover exemplary damages;[b] but mere indecorous conduct in expelling a passenger is held not to be sufficient cause for their infliction.[c]

§ 366. **For wantonness of injury.**—If the injury was wantonly inflicted, exemplary damages may be recovered.[d] By wantonness is meant reckless disregard of the rights of others, or of the consequences of the act. Thus in Baltimore & Yorktown Turnpike Road *v.* Boone,[e] where the company exacted illegal fare and the plaintiff, on his refusal to pay, was forcibly ejected, it was held that he could recover exemplary damages on the ground that the company had been guilty of a criminal indifference to the obligations of public duty, which amounted to malice.

§ 367. **For fraud.**—If the injury was inflicted through fraud, there are intimations that this alone would afford ground for exemplary damages;[f] it is difficult to see how a fraudulent tort can be accomplished without a malicious intent.

§ 368. **For gross negligence.**—In Wilson *v.* Brett,[g] Rolfe, B., said that he could see no difference between

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[a] Redfield *v.* Redfield, 75 Ia. 435.

[b] P. W. & B. R.R. Co. *v.* Larkin, 47 Md. 155; Knowles *v.* N. S. R.R. Co., 102 N. C. 59.

[c] L. & N. R.R. Co. *v.* Ballard, 85 Ky. 307.

[d] Dibble *v.* Morris, 26 Conn. 416; Kilbourn *v.* Thompson, 1 McA. & M. 401; Sherman *v.* Dutch, 16 Ill. 283; Louisville & N. R.R. Co. *v.* Ballard, 85 Ky. 307; Webb *v.* Gilman, 80 Me. 177; Sapp *v.* North C. Ry. Co., 51 Md. 115; Goetz *v.* Ambs, 27 Mo. 28; Green *v.* Craig, 47 Mo. 90; Phila. Traction Co. *v.* Orbann, 119 Pa. 37; Hoadley *v.* Watson, 45 Vt. 289; Borland *v.* Barrett, 76 Va. 128.

[e] 45 Md. 344.

[f] L. & N. R.R. Co. *v.* Ballard, 85 Ky. 307; but see *contra*, Singleton *v.* Kennedy, 9 B. Mon. 222.

[g] 11 M. & W. 113.

negligence and *gross* negligence; that it was the same thing with the addition of a vituperative epithet, and this observation has been quoted with approval in later cases.[a] In Railroad Co. *v.* Lockwood,[b] Mr. Justice Bradley, after stating the distinctions commonly drawn between slight, ordinary and gross negligence, said: "In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities." In these cases, however, the question was not considered with reference to exemplary damages, but to the amount of care due from the defendants in their respective situations. Whether little or great care is due, a dereliction from that amount is, in each case, negligence, and creates a *liability;* but one upon whom a duty is imposed may fall a little or far below the line dividing liability from impunity, and it is not improper, when the latter is the case, to apply the term "gross" to the defendant's dereliction, having reference, however, merely to the character of his acts and not to his liability. The allowance of exemplary damages depends upon the bad motive of the wrong-doer as exhibited by his acts. Where, therefore, the acts fall short of wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences, exemplary damages should not be given. Gross negligence, so far as *right of action* is concerned, is, as Rolfe, B., said, only negligence with a vituperative epithet; as a malicious wrong, so far as right of action goes, does not differ from

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[a] Grill *v.* General I. S. C. Co., 12 Jur. N. S. 727; McPheeters *v.* Hannibal & St. J. R.R. Co., 45 Mo. 22; Milwaukee & St. Paul Ry. *v.* Arms, 91 U. S. 489; and see Steamboat New World *v.* King, 16 How. 469.

[b] 17 Wall. 357, 383.

any other wrong. But as malice, though not making the act legally more wrongful, may be a ground for exemplary damages, so may grossness of negligence in the sense explained above; and the term so explained is open to no objection, and accords with its use in common speech.

Gross negligence, then, in the sense of culpable indifference to consequences, is usually held to be a good ground for the allowance of exemplary damages;([a]) in this sense it is therefore such negligence as evinces a conscious indifference to consequences;([b]) as, for instance, where the owner of a furious dog knowingly allowed it to run at large.([c])

§ 369. **Circumstances preventing the allowance of exemplary damages.**—As the ground of allowing exemplary damages is the evil motive of the defendant, all circumstances showing that he had no such motive may be

([a]) Emblen *v.* Myers, 6 H. & N. 54; U. S. *v.* Taylor, 35 Fed. Rep. 484; Mobile & M. R.R. Co. *v.* Ashcraft, 48 Ala. 15; Lienkauf *v.* Morris, 66 Ala. 406; C. S. Ry. Co. *v.* Steen, 42 Ark. 321; W. U. Tel. Co. *v.* Eyser, 2 Col. 141; Linsley *v.* Bushnell, 15 Conn. 225; Kilbourn *v.* Thompson, 1 McA. & M. 401; Frink *v.* Coe, 4 Greene (Ia.) 555; Cochran *v.* Miller, 13 Ia. 128; Bowler *v.* Lane, 3 Metc. (Ky.) 311; Fleet *v.* Hollenkemp, 13 B. Mon. 219; Kountz *v.* Brown, 16 B. Mon. 577; Wilkinson *v.* Drew, 75 Me. 360; Vicksburg & J. R.R. Co. *v.* Patton, 31 Miss. 156; Memphis & C. R.R. Co. *v.* Whitfield, 44 Miss. 466; Hopkins *v.* A. & St. L. R.R. Co., 36 N. H. 9; Taylor *v.* G. T. Ry. Co., 48 N. H. 304; Caldwell *v.* N. J. S. B. Co., 47 N. Y. 282; Pittsburgh C. & S. L. Ry. Co. *v.* Lyon, 123 Pa. 140; Byram *v.* McGuire, 3 Head 530; Kolb *v.* Bankhead, 18 Tex. 228. *Contra*, under the California code: Yerian *v.* Linkletter, 80 Cal. 135.

([b]) M. & St. P. Ry. Co. *v.* Arms, 91 U. S. 489; Lienkauf *v.* Morris, 66 Ala. 406; Moody *v.* McDonald, 4 Cal. 297; Kolb *v.* O'Brien, 86 Ill. 210; Louisville N. A. & C. Ry. Co. *v.* Shanks, 94 Ind. 598; Kansas P. Ry. Co. *v.* Little, 19 Kas. 267; Kentucky C. R.R. Co. *v.* Dills, 4 Bush 593; Jacobs *v.* L. & N. R.R. Co., 10 Bush 263; Bannon *v.* B. & O. R.R. Co., 24 Md. 108; Chicago, St. L. & N. O. R.R. Co. *v* Scurr, 59 Miss. 456; Fisher *v.* Met. El. Ry. Co., 34 Hun 433; Cotton Press Co. *v.* Bradley, 52 Tex. 587; Pickett *v.* Crook, 20 Wis. 358.

([c]) Von Fragstein *v.* Windler, 2 Mo. App. 598; Meibus *v.* Dodge, 38 Wis. 300.

proved, to prevent the allowance of such damages: if they show that the defendant's malice was slight, they may be proved to mitigate exemplary damages. Proof of such circumstances for either purpose will be more fully discussed later.(a)

§ 370. **In what actions exemplary damages may be recovered.**—Ordinarily exemplary damages are allowed only in actions of tort. In actions of contract, exemplary damages cannot be recovered.(b) An exception is the action for breach of promise of marriage. In that action it is held that if the engagement to marry was broken with circumstances of abruptness and humiliation, exemplary damages may be recovered.(c) It has been held in some cases that if the condition of a bond given in pursuance of a statute is broken by the commission of a tort, such as would be a proper cause for exemplary damages; such damages may be recovered in an action on the bond.(d) This is contrary, however, to the current of authority, which is to the effect that only compensatory damages can be recovered in an action on a statutory bond.(e)

§ 371. **Not recoverable in equity.**—Where a court of equity has power to award damages, it cannot go beyond compensation; by applying to such a court, the complainant waives all claim to exemplary damages.(f)

§ 372. **In actions for personal injury.**—Exemplary damages may be recovered, in the proper case, in an action

(a) §§ 383–386.

(b) Guildford *v.* Anglo-French S.S. Co., 9 Can. 303.

(c) McPherson *v.* Ryan, 59 Mich. 33; Johnson *v.* Jenkins, 24 N. Y. 252; Thorn *v.* Knapp, 42 N. Y. 474.

(d) Floyd *v.* Hamilton, 33 Ala. 235; Richmond *v.* Shickler, 57 Ia. 486; Renkert *v.* Elliott, 11 Lea 235.

(e) Cobb *v.* People, 84 Ill. 511; McClendon *v.* Wells, 20 S. C. 514.

(f) Bird *v.* W. & M. R.R. Co., 8 Rich. Eq. 46.

of assault and battery,[a] false imprisonment,[b] malicious prosecution,[c] or other injury to the person, as where the plaintiff was wrongfully and wantonly ejected from a railroad train.[d] In Mississippi it has been held that where a passenger is wilfully carried beyond his station he may recover exemplary damages.[e]

§ 373. For injury to property. — Exemplary damages may in a proper case be recovered for a wilful injury to land, as for a malicious trespass[f] or flowing of

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[a] Bundy *v.* Maginness, 76 Cal. 532; Smith *v.* Bagwell, 19 Fla. 117; McNamara *v.* King, 7 Ill. 432; Reeder *v.* Purdy, 48 Ill. 261; Drohn *v.* Brewer, 77 Ill. 280; Harreson *v.* Ely, 120 Ill. 83; Root *v.* Sturdivant, 70 Ia. 55; Titus *v.* Corkins, 21 Kas. 722; Slater *v.* Sherman, 5 Bush 206; Pike *v.* Dilling, 48 Me. 539; Webb *v.* Gilman, 80 Me. 177; Baltimore & Yorktown Turnpike *v.* Boone, 45 Md. 344; Elliott *v.* Van Buren, 33 Mich. 49; Green *v.* Craig, 47 Mo. 90; Cook *v.* Ellis, 6 Hill 466; Louder *v.* Hinson, 4 Jones L. 369; Porter *v.* Seiler, 23 Pa. 424; Newell *v.* Whitcher, 53 Vt. 589; Borland *v.* Barrett, 76 Va. 128; Shay *v.* Thompson, 59 Wis. 540.

[b] Huckle *v.* Money, 2 Wils. 205; Bradley *v.* Morris, Busbee 395; McCarthy *v.* De Armit, 99 Pa. 63; Gingras *v.* Desilets, Cass. Can. Dig. 116; Clissold *v.* Machell, 26 Up. Can. Q. B. 422.

[c] Donnell *v.* Jones, 13 Ala. 490; Coleman *v.* Allen, 79 Ga. 637 (by code); Parkhurst *v.* Masteller, 57 Ia. 474; McWilliams *v.* Hoban, 42 Md. 56; Peck *v.* Small, 35 Minn. 465; Winn *v.* Peckham, 42 Wis. 493; Spear *v.* Hiles, 67 Wis. 350.

[d] Dalton *v.* Beers, 38 Conn. 529; Georgia R.R. Co. *v.* Olds, 77 Ga. 673 (by code); Jeffersonville R.R. Co. *v.* Rogers, 38 Ind. 116; P. W. & B. R.R. Co. *v.* Larkin, 47 Md. 155; Knowles *v.* N. S. R.R. Co., 102 N. C. 59.

[e] Higgins *v.* L. N. O. & T. R.R. Co., 64 Miss. 80; Dorrah *v.* I. C. R.R. Co., 65 Miss. 14.

[f] Brewer *v.* Dew, 11 M. & W. 625; U. S. *v.* Taylor, 35 Fed. Rep. 484; Devaughn *v.* Heath, 37 Ala. 595; Clark *v.* Bales, 15 Ark. 452; Waters *v.* Dumas, 75 Cal. 563 (by code); Curtiss *v.* Hoyt, 19 Conn. 154; Shores *v.* Brooks, 81 Ga. 468; Cutler *v.* Smith, 57 Ill. 252; Chicago & I. R.R. Co. *v.* Baker, 73 Ill. 316; Keirnan *v.* Heaton, 69 Ia. 136; Hefley *v.* Baker, 19 Kas. 9; Jennings *v.* Maddox, 8 B. Mon. 430; Ames *v.* Hilton, 70 Me. 36; Briggs *v.* Milburn, 40 Mich. 512; Craig *v.* Cook, 28 Minn. 232; Parker *v.* Shackelford, 61 Mo. 68; Newman *v.* St. L. & I. M. R.R. Co., 2 Mo. App. 402; Perkins *v.* Towle, 43 N. H. 220; Winter *v.* Peterson, 24 N. J. L. 524; Allaback *v.* Utt, 51 N. Y. 651; Day *v.* Holland, 15 Ore. 464 (*semble*); Windham *v.* Rhame, 11 Rich. L. 283; Jefcoat *v.* Knotts, 11 Rich. L. 649; Greenville &

land.[a] Such damages were allowed for maliciously setting fire to the plaintiff's house ; [b] in an action for damage to hedges ; [c] in an action for defacing the walls and breaking the windows of the plaintiff's house ; [d] and in an action for cutting and carrying away timber and hauling away sand.[e] So also in an action of forcible entry.[f] Exemplary damages may also be recovered in the proper case for an injury to personal property. So exemplary damages have been allowed for a wrongful levy or attachment of personal property,[g] for wrongfully suing out an attachment writ,[h] or for a wrongful distraint ; [k] for the vexatious or oppressive detention of personal property,[l] as for instance the wanton refusal of a carrier to deliver goods seasonably ; [m] for the malicious taking of personal property or injury to it,[n] as for the killing of a slave [o] or domestic animal.[p]

C. R.R. Co. *v.* Partlow, 14 Rich. L. 237 ; Cox *v.* Crumley, 5 Lea 529 ; Cook *v.* Garza, 9 Tex. 358 ; Ellsworth *v.* Potter, 41 Vt. 685 ; Burnham *v.* Jenness, 54 Vt. 272 ; Camp *v.* Camp, 59 Vt. 667 ; Koenigs *v.* Jung, 73 Wis. 178.

[a] Hughes *v.* Anderson, 68 Ala. 280 ; Martin *v.* Riddle, 26 Pa. 415 n.

[b] Smalley *v.* Smalley, 81 Ill. 70.

[c] Parker *v.* Shackelford, 61 Mo. 68.

[d] Weston *v.* Gravlin, 49 Vt. 507. [e] Rosser *v.* Bunn, 66 Ala. 89.

[f] Mosseller *v.* Deaver, 106 N. C. 494.

[g] Jefferson County Savings Bank *v.* Eborn, 84 Ala. 529 ; Bates *v.* Callender, 3 Dak. 256 ; Sherman *v.* Dutch, 16 Ill. 283 ; Nagle *v.* Mullison, 34 Pa. 48.

[h] Floyd *v.* Hamilton, 33 Ala. 235 ; Lawrence *v.* Hagerman, 56 Ill. 68 ; Morris *v.* Shew, 29 Kas. 661.

[k] Clevenger *v.* Dunaway, 84 Ill. 367 ; Briscoe *v.* McElween, 43 Miss. 556.

[l] Taylor *v.* Morgan, 3 Watts 333. [m] Silver *v.* Kent, 60 Miss. 124.

[n] Dibble *v.* Morris, 26 Conn. 416 ; Bull *v.* Griswold, 19 Ill. 631 ; Johnson *v.* Camp, 51 Ill. 219 ; Kountz *v.* Brown, 16 B. Mon. 577 ; Schindel *v.* Schindel, 12 Md. 108 ; Snively *v.* Fahnestock, 18 Md. 391 ; Young *v.* Mertens, 27 Md. 114.

[o] Polk *v.* Fancher, 1 Head 336.

[p] Parker *v.* Mise, 27 Ala. 480 ; Dean *v.* Blackwell, 18 Ill. 336 ; Woert v. Jenkins, 14 Johns. 352 ; Cole *v.* Tucker, 6 Tex. 266 ; Champion *v.* Vincent, 20 Tex. 811.

§ 374. **In actions of trover.**—In actions of trover the jury may go beyond the value and give exemplary damages when there has been outrage in the taking, or vexation or oppression in the detention.[1] ([a])

§ 375. **Of replevin.**—In New York and Pennsylvania, it has been declared that if the writ of replevin be sued out fraudulently, vexatiously, or maliciously, or the defendant's proceedings be of the same character, the jury may give exemplary damages against either plaintiff or defendant, as in cases of wilful trespass.[2] ([b]) And the same rule should apply in actions of detinue.([c])

§ 376. **For loss of service.**—Exemplary damages have been allowed in actions for loss of service either through enticement ([d]) or seduction;([e]) and in actions for criminal

[1] Dennis *v.* Barber, 6 S. & R. 420; Harger *v.* McMains, 4 Watts 418; Taylor *v.* Morgan, 3 Watts 333.

[2] Cable *v.* Dakin, 20 Wend. 172; McDonald *v.* Scaife, 11 Pa. 381; Brizsee *v.* Maybee, 21 Wend. 144.

([a]) The cases in which exemplary damages have been allowed in actions of trover seem to have been infrequent; but there can be no doubt that such damages may be allowed. *Contra*, that exemplary damages cannot be given in trover, Peterson *v.* Gresham, 25 Ark. 380; Berry *v.* Vantries, 12 S. & R. 89. In Jones *v.* Rahilly, 16 Minn. 320, it was said that exemplary damages cannot be given for a wilful withholding of property that came rightfully into the defendant's possession; but they were allowed in such a case in Silver *v.* Kent, 60 Miss. 124; Taylor *v.* Morgan, 3 Watts 333.

([b]) Holt *v.* Van Eps, 1 Dak. 206; Whitfield *v.* Whitfield, 40 Miss. 352 (*semble*); McCabe *v.* Morehead, 1 W. & S. 513; Schofield *v.* Ferrers, 46 Pa. 438. It is otherwise in this action in Illinois and Indiana. Butler *v.* Mehrling, 15 Ill. 488; Hotchkiss *v.* Jones, 4 Ind. 260. And the mere fact that the wrong-doer acted wilfully does not justify such damages. There must be circumstances of fraud, malice, or wanton injury to entitle the plaintiff to recover them. Single *v.* Schneider, 30 Wis. 570.

([c]) Whitfield *v.* Whitfield, 40 Miss. 352 (*semble*); but *contra*, McDonald *v.* Norton, 72 Ia. 652.

([d]) Smith *v.* Goodman, 75 Ga. 198; Tyson *v.* Ewing, 3 J. J. Marsh 185; Bixby *v.* Dunlap, 56 N. H. 456; Magee *v.* Holland, 27 N. J. L. 86.

([e]) Robinson *v.* Burton, 5 Harr. 335; Grable *v.* Margrave, 4 Ill. 372; Stevenson *v.* Belknap, 6 Ia. 97; Fox *v.* Stevens, 13 Minn. 272; Lavery *v.* Crooke, 52 Wis. 612.

conversation ([a]) and for harboring the plaintiff's wife.([b]) It has been held that exemplary damages cannot be recovered in an action for loss of service caused by physical injury to a child or servant. They are only given if the injured child or servant brings the action in his own name.([c])

§ 377. **Exemplary damages for defamation.**—In actions for libel or slander exemplary damages may be given in the proper case.([d]) The evil intent that justifies exemplary damages in these cases is usually express malice,([e]) of which the falsity of the defamation is evidence;([f]) but it is enough if the defamation was uttered with wilful indifference to the consequences, that is, in mere wantonness.([g]) The bad character of the plaintiff may be shown in mitigation of exemplary as well as of compensatory damage.([h])

§ 378. **Liability of a principal to exemplary damages for the act of his agent or servant.**—It is the better opinion that no recovery of exemplary damages can be had

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([a]) Johnston *v.* Disbrow, 47 Mich. 59.

([b]) Johnson *v.* Allen, 100 N. C. 131.

([c]) Black *v.* C. R.R. Co., 10 La. Ann. 33; Hyatt *v.* Adams, 16 Mich. 180 *(semble)*; Whitney *v.* Hitchcock, 4 Den. 461; but *contra*, Klingman *v.* Holmes, 54 Mo. 304.

([d]) Philadelphia, W. & B. R.R. Co. *v.* Quigley, 21 How. 202; Binford *v.* Young, 115 Ind. 174; Daly *v.* Van Benthuysen, 3 La. Ann. 69; Buckley *v.* Knapp, 48 Mo. 152; King *v.* Root, 4 Wend. 113; Bergmann *v.* Jones, 94 N. Y. 51; Sowers *v.* Sowers, 87 N. C. 303; Barr *v.* Moore, 87 Pa. 385; Rea *v.* Harrington, 58 Vt. 181; Harman *v.* Cundiff, 82 Va. 239; Klewin *v.* Bauman, 53 Wis. 244; Guest *v.* Macpherson, 3 Leg. News (Quebec) 84; Silver *v.* Dom. Tel. Co., 2 R. & G. (N. Scot.) 17.

([e]) Philadelphia, W. & B. R.R. Co. *v.* Quigley, 21 How. 202.

([f]) Bergmann *v.* Jones, 94 N. Y. 51.

([g]) Bowden *v.* Bailes, 101 N. C. 612.

([h]) Maxwell *v.* Kennedy, 50 Wis. 645.

against a principal for the tort of an agent or servant,[a] unless the defendant expressly authorized the act as it was performed or approved it,[b] or was grossly negligent in hiring the agent or servant,[c] or in not preventing him from committing the act.[d] The burden of showing authorization or approval by the principal is on the plaintiff.[e] In Cleghorn *v.* N. Y. Cent. & H. R. R.R. Co.,[f] Church, C. J., said:

"For injuries by negligence of the servant, however gross or culpable, he (the master) is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. If a railroad company knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character above specified."

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[a] The Amiable Nancy, 3 Wheat. 546; Pollock *v.* Gantt, 69 Ala. 373; Burns *v.* Campbell, 71 Ala. 271; Wardrobe *v.* Stage Co., 7 Cal. 118; Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657, overruling Wade *v.* Thayer, Ibid. 578; Grund *v.* Van Vleck, 69 Ill. 478; Keene *v.* Lizardi, 8 La. 26; Boulard *v.* Calhoun, 13 La. Ann. 445; Texas T. Ry. Co. *v.* Johnson, 75 Tex. 158.

[b] Lienkauf *v.* Morris, 66 Ala. 406; Becker *v.* Dupree, 75 Ill. 167; Evis-ton *v.* Cramer, 57 Wis. 570.

[c] Burns *v.* Campbell, 71 Ala. 271; Sawyer *v.* Sauer, 10 Kas. 466.

[d] Freese *v.* Tripp, 70 Ill. 496; Kehrig *v.* Peters, 41 Mich. 475.

[e] Haines *v.* Schultz, 50 N. J. L. 481.

[f] 56 N. Y. 44.

The Chief Justice also said: "It is the exception and not the rule that, in this class of cases, exemplary damages are allowable."

In some jurisdictions, however, the principal, if liable for compensatory damages, is liable also for exemplary damages as the agent or servant would be.[a] Where one partner in the course of the partnership business commits a tort subjecting him to exemplary damages, such damages may be recovered from the firm.[b]

§ 379. **Of a corporation for acts of agents.**—A corporation is liable for exemplary damages for its own act, that is, for the act of its directors or other agents whose act is the act of the corporation. Thus gross negligence in hiring servants will subject a corporation to exemplary damages,[c] and so will express authorization or ratification of the servant's acts.[d] It is held, however, that municipal corporations are not liable to exemplary damages.[e]

§ 380. **For acts of servants.**—It is held in many, perhaps in most, jurisdictions that a corporation is liable to exemplary damages, if to any, for an act of its servant which would

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[a] Hazard *v.* Israel, 1 Binn. 240; Southern Express Co. *v.* Brown, 67 Miss. 260.

[b] Robinson *v.* Goings, 63 Miss. 500.

[c] Henning *v.* Western U. T. Co., 41 Fed. Rep. 864; S. & N. A. R.R. Co. *v.* McLendon, 63 Ala. 266; Murphy *v.* N. Y. & N. H. R.R. Co., 29 Conn. 496; I. C. R.R. Co. *v.* Hammer, 72 Ill. 347; Cleghorn *v.* N. Y. C. & H. R. R.R. Co, 56 N. Y. 44; Sullivan *v.* Ore. Ry. & Nav. Co., 12 Ore. 392; Nashville & C. R.R. Co. *v.* Starnes, 9 Heisk. 52.

[d] Illinois C. R.R. Co. *v.* Hammer, 72 Ill. 347; Malecek *v.* Tower G. & L. Ry. Co., 57 Mo. 17; Doss *v.* Missouri, K. & T. R.R. Co., 59 Mo. 27; Travers *v.* Kansas P. Ry. Co., 63 Mo. 421; Murphy *v.* Central Park, N. & E. R.R. Co., 48 N. Y. Super. Ct. 96; Nashville & C. R.R. Co. *v.* Starnes, 9 Heisk. 52; Milwaukee & M. R.R. Co. *v.* Finney, 10 Wis. 388; Craker *v.* Chicago & N. W. Ry. Co., 36 Wis. 657: Bass *v.* Chicago & N. W. Ry. Co., 42 Wis. 654.

[e] Larson *v.* Grand Forks, 3 Dak. 307; Chicago *v.* Langlass, 52 Ill. 256; Chicago *v.* Jones, 66 Ill. 349; Chicago *v.* Kelly, 69 Ill. 475; Wilson *v.* Wheeling, 19 W. Va. 323.

subject the servant to exemplary damages.[a] It is argued that since a corporation can act only by its agents or servants it would altogether escape liability to exemplary damages unless it were subjected to them for its agents' or servants' acts. The corporation is therefore held liable although in most of these jurisdictions an individual principal would not be. In South Carolina this has been carried so far that a corporation is held liable in exemplary damages for the act of another corporation which was operating its railroad as lessee.[b] But it is more in the nature of exemplary damages, as punishment, to allow a recovery of them only against a defendant who has been personally in fault; the better opinion, therefore, seems to be that exemplary damages should be allowed against a corporation for the act of its servant only if it expressly authorized the act as it was performed, or afterwards

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[a] *Arkansas:* C. S. Ry. Co. *v.* Steen, 42 Ark. 321. *Colorado:* (before exemplary damages were disallowed): W. U. Tel. Co. *v.* Eyser, 2 Col. 141. *District of Columbia:* Flannery *v.* B. & O. R.R. Co., 4 Mack. 111. *Georgia:* Gasway *v.* A. & W. P. R.R. Co., 58 Ga. 216; G. R.R. Co. *v.* Olds, 77 Ga. 673 (by code). *Illinois:* I. C. R.R. Co. *v.* Hammer, 72 Ill. 353; Singer Manuf. Co., *v.* Holdfodt, 86 Ill. 455; Wabash, St. L. & P. Ry. Co. *v.* Rector, 104 Ill. 296. *Indiana:* J. R.R. Co. *v.* Rogers, 38 Ind. 116. *Kansas:* Wheeler & Wilson Manuf. Co. *v.* Boyce, 36 Kas. 350. *Kentucky:* Bowler *v.* Lane, 3 Met. (Ky.) 311; Jacobs *v.* L. N. & R.R. Co., 10 Bush 263; L. & N. R.R. *v.* Ballard, 85 Ky. 307. *Maine:* Goddard *v.* G. T. Ry. Co., 57 Me. 202; Hanson *v.* E. & N. A. R.R. Co., 62 Me. 84. *Maryland:* B. & O. R.R. Co. *v.* Blocher, 27 Md. 277; Baltimore & Yorktown Turnpike *v.* Boone, 45 Md. 344; Phila., W. & B. R. R. Co. *v.* Larkin, 47 Md. 155. *Mississippi:* V. & J. R.R. Co. *v.* Patton, 31 Miss. 156. *Missouri:* Perkins *v.* M. K. & T. R.R. Co., 55 Mo. 201; Travers *v.* K. P. Ry. Co., 63 Mo. 421; (overruling McKeon *v.* C. Ry. Co., 42 Mo. 79). *New Hampshire* (before exemplary damages were disallowed): Belknap *v.* B. & M. R.R. Co., 49 N. H. 358. *Ohio:* A. & G. W. Ry. Co. *v.* Dunn, 19 Oh. St. 162. *Pennsylvania:* L. S. & M. S. Ry. Co. *v.* Rosenzweig, 113 Pa. 519; Phila. Traction Co. *v.* Orbann, 119 Pa. 37. *South Carolina:* Quinn *v.* S. C. Ry. Co., 29 S. C. 381. *Tennessee:* L. & N. R.R. Co. *v.* Garrett, 8 Lea 438 (explaining N. & C. R.R. Co. *v.* Starnes, 9 Heisk. 52).

[b] Hart *v.* Charlotte, C. & A. R.R. Co., 12 S. E. Rep. 9 (S. C.).

ratified it, or was negligent in hiring the servant or retaining him in its employ. And such is the law in many jurisdictions.[a]

§ 381. **Of an officer.**—A ministerial officer acting in good faith is not liable to exemplary damages; but such an officer is liable to exemplary damages if he acts maliciously.[b]

§ 382. **Of one of two joint defendants.**—When only one of two or more joint wrong-doers acted in such a way as to render himself liable to exemplary damages, the plaintiff may have judgment against him for exemplary damages and against the others for compensatory damages.[c] When, however, a husband and wife are sued jointly for the tort of the wife, a judgment for exemplary damages may be recovered against them jointly; for the husband is not really a joint defendant, but only a formal party.[d]

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[a] *Alabama:* City National Bank *v.* Jeffries, 73 Ala. 183. *California:* Turner *v.* N. B. & M. R.R. Co., 34 Cal. 594; Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657. *Delaware:* McCoy *v.* P. W. & B. R.R. Co., 5 Houst. 599. *Louisiana:* Hill *v.* N. O. O. & G. W. R.R. Co., 11 La. Ann. 292. *Michigan:* Great W. Ry. Co. *v.* Miller, 19 Mich. 305. *New Jersey:* Ackerson *v.* Erie Ry. Co., 32 N. J. L. 254. *New York:* Murphy *v.* Central Park, N. & E. R. R.R. Co., 48 N. Y. Super. Ct. 96. *Oregon:* Sullivan *v.* Ore. Ry. & Nav. Co., 12 Ore. 392. *Pennsylvania:* Keil *v.* Chartiers V. C. Co., 131 Pa. 466 (but see Lake S. R.R. Co. *v.* Rosenzweig, 113 Pa. 519; Philadelphia T. Co. *v.* Orbann, 119 Pa. 37). *Rhode Island:* Hagan *v.* P. & W. R.R. Co., 3 R. I. 88. *Texas:* Hays *v.* H. G. N. R.R. Co., 46 Tex. 272; G. H. & S. A. Ry. Co. *v.* Donahoe, 56 Tex. 162; International & G. N. R.R. Co. *v.* Garcia, 70 Tex. 207. *West Virginia:* Ricketts *v.* Chesapeake & O. Ry. Co., 10 S. E. Rep. 801. *Wisconsin:* M. & M. R.R.Co. *v.* Finney, 10 Wis. 388; Bass *v.* C. & N. W. Ry. Co., 36 Wis. 450; 39 Wis. 636; Craker *v.* C. & N. W. Ry. Co., 36 Wis. 657; Eviston *v.* Cramer, 57 Wis. 570.

[b] Nightingale *v.* Scannell, 18 Cal. 315; Pratt *v.* Pond, 42 Conn. 318; Plummer *v.* Harbut, 5 Ia. 308; Pierce *v.* Getchell, 76 Me. 216.

[c] Clark *v.* Newsam, 1 Ex. 131; Clissold *v.* Machell, 26 Up. Can. Q. B. 422. But in McCarthy *v.* De Armit, 99 Pa. 63, it was held that if one of the defendants was not liable to exemplary damages, none could be given. If all were liable, the jury should assess damages as against the least culpable defendant.

[d] Munter *v.* Bande, 1 Mo. App. 484; Lombard *v.* Batchelder, 58 Vt. 558.

§ 383. **Mitigation or aggravation—Want of malice.**—Since the cause for inflicting exemplary damages is a malicious intent on the part of the defendant, and the amount is regulated according to the degree of wrong, all circumstances bearing on the defendant's intent may be shown to the jury, to be considered by them. All circumstances which negative the existence of malice, or show the malice to have been little, may be shown to mitigate the damages: such circumstances are good faith, the advice of counsel, and belief of right. The existence of one of these will not, however, protect the defendant if, in spite of it, he acted in a cruel and abusive manner;[a] thus, though the defendant honestly believed the slander he published to be true, yet if he published it in a wanton and reckless manner, or maliciously, the plaintiff may recover exemplary damages.[b] With this qualification, any circumstance of the sort mentioned will protect the defendant from exemplary damages. So where the cause of offence was discontinued by the defendant with reasonable promptness, that will rebut the presumption of malice, and prevent the recovery of exemplary damages.[c] In short, as exemplary damages are recoverable only upon a full view of the motive of the act, in the light of all the attendant circumstances, so too all circumstances going to show that the motive of the act was innocent must be taken into account also.[d]

If the defendant acted in good faith, he cannot be made liable to exemplary damages.[e] So in an action

[a] Dalton *v.* Beers, 38 Conn. 529; Johnson *v.* Camp, 51 Ill. 219; Bauer *v.* Gottmanhausen, 65 Ill. 499; Jasper *v.* Purnell, 67 Ill. 358; Raynor *v.* Nims, 37 Mich. 34.

[b] Hayner *v.* Cowden, 27 Oh. St. 292.

[c] Oursler *v.* Baltimore & O. R.R. Co., 60 Md. 358.

[d] Millard *v.* Brown, 35 N. Y. 297.

[e] St. Peter's Church *v.* Beach, 26 Conn. 355.

of libel, good faith may be shown to prevent exemplary damages.[a] And where a collector of customs while carrying out in good faith the orders of his superior officer committed a tort, it was held that he was not liable to exemplary damages;[b] nor is any ministerial officer acting in good faith.[c] So where a railway conductor acted honestly in ejecting the plaintiff from a car, exemplary damages cannot be recovered.[d] If the defendant acted under the advice of counsel, the plaintiff cannot recover exemplary damages;[e] and the same is true where he acted upon the advice of one he supposed to be a lawyer, who in fact was not.[f] But the advice of a layman who made no pretence to being a lawyer will not relieve the defendant from liability to exemplary damages.[g] And the advice of counsel will be no protection if it is not exactly followed; so where the defendant's lawyer advised him that he could enter certain premises if the plaintiff's family were away, and in fact he entered them when they were not away, the advice could not protect him from exemplary damages.[h] Nor will the defendant be protected unless he shows that the advice was based upon a knowledge of all the facts of the case.[k] If the defendant honestly believed himself in

[a] Bennett *v.* Smith, 23 Hun 50.

[b] Tracy *v.* Swartwout, 10 Pet. 80.

[c] Plummer *v.* Harbut, 5 Ia. 308; Pierce *v.* Getchell, 76 Me. 216.

[d] Fitzgerald *v.* Chicago, R. I. & P. Ry. Co., 50 Ia. 79; Philadelphia, W. & B. R.R. Co. *v.* Hoeflich, 62 Md. 300; Logan *v.* Hannibal & S. J. R.R. Co., 77 Mo. 663; Hamilton *v.* Third Ave. R.R. Co., 53 N. Y. 25; Yates *v.* New York C. & H. R. R.R. Co., 67 N. Y. 100; Tomlinson *v.* Wilmington & S. C. R.R. Co., 12 S. E. Rep. 138 (N. C.).

[e] City Nat. Bank *v.* Jeffries, 73 Ala. 183; Cochrane *v.* Tuttle, 75 Ill. 361; Bonesteel *v.* Bonesteel, 30 Wis. 511.

[f] Murphy *v.* Larson, 77 Ill. 172.

[g] Livingston *v.* Burroughs, 33 Mich. 511.

[h] Carpenter *v.* Barber, 44 Vt. 441.

[k] Shores *v.* Brooks, 81 Ga. 468.

the right, this may be shown to prevent or mitigate the allowance of exemplary damages;[a] and therefore a trespass committed through a mistake as to the rights of the parties will not give a right to exemplary damages.[b] And of course the fact that the suit is an amicable suit will prevent such allowance.[c]

§ 384. **Provocation.**—The existence of provocation, though it may not be a defense, will prevent the allowance of exemplary damages.[d] Thus in an action of false imprisonment it appeared that the plaintiff had been arrested for contempt of court in not complying with an order to pay a claim against an estate of which he was administrator. The order turned out to be void. It was held that the defendant might show, in mitigation of exemplary damages, fraud on the part of the plaintiff in getting possession of the estate and the making false claims against it in order to escape payment of the legal claims.[e] So in an action of assault and battery the fact that the injury was inflicted during a mutual fight will prevent the allowance of exemplary damages.[f] So in an action of trespass *quare clausum* it has been held that it could be shown, in mitigation of exemplary damages, that the parties had had a difficulty in the morning, for, *per curiam*, "otherwise there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of a previous affray might have some weight upon the question of the amount of damages re-

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[a] Wilkinson *v.* Searcy, 76 Ala. 176; Farwell *v.* Warren, 70 Ill. 28; Allison *v.* Chandler, 11 Mich. 542.

[b] Brown *v.* Allen, 35 Ia. 306.

[c] Amer *v.* Longstreth, 10 Pa. 145.

[d] Ward *v.* Blackwood, 41 Ark. 295.

[e] Johnson *v.* Von Kettler, 66 Ill. 63.

[f] Shay *v.* Thompson, 59 Wis. 540.

coverable, and might legitimately be regarded as a part of the transaction to be investigated in this suit." (a)

In a case where the plaintiff was the aggressor, but the defendant in his defense used excessive force, the Court of Appeals of New York refused to allow exemplary damages.(b) In the course of the opinion Danforth, J., said :

"If the injury of which he complains came in part from his own act, there is less reparation demanded from the defendant, for the law seeks to do justice between the parties, and will not require one to atone for the other's error. If satisfaction is to be made for the breach of public order, it is not due to him, for his own wrong is the consideration upon which it stands, and for that he cannot be allowed to profit. Otherwise he would receive compensation for damages occasioned by himself. Yet we have this spectacle before us. A fine laid upon the defendant that the rights of others may be respected, and its payment ordered, not into the public treasury, but the hand of the first aggressor. The law is careful and exact in its dealings. It denies compensation to him who, by his own negligence, contributed to injuries from which he suffers. Much less will it allow one who excites public disorder to profit by punishment imposed upon his adversary for the protection of the community. In offending, the plaintiff came first. If he had kept the peace there would have been no second. It would very much impair that sense of security which grows out of the legal right to hold and enjoy property, and defend by reasonable force its possession, if the owner, when his rights are invaded, was required to answer not only for a failure to measure with precision the degree of strength applicable to the aggressor, but respond to him in a civil action according to the estimate which a jury influenced by the impassioned appeals of private counsel might place upon the value of public order."

A provocation offered *some time* previously cannot be shown in mitigation. It must have been so recent that

(a) Currier *v.* Swan, 63 Me. 323.
(b) Kiff *v.* Youmans, 86 N. Y. 324, 331.

the act can be said to have been committed under the immediate influence of the feelings excited.[a]

§ 385. **Exemplary damages as affected by the pecuniary condition of the defendant.**—The plaintiff may show the defendant's wealth, that the jury may judge what will be a sufficient punishment;[b] and in rebuttal the defendant may show his own poverty.[c] In Maine it is held that the defendant may show his poverty, even though the plaintiff has introduced no evidence on the point.[d] It was suggested in one case that the plaintiff might show his own poverty to enhance exemplary damages.[e] This, however, has usually nothing to do with the proper punishment of the defendant.

§ 386. **Exemplary damages for injuries which are also crimes.**—In some jurisdictions it is held that the doctrine of exemplary damages does not apply to actions for wrongs which are also criminal offenses, on the ground that the defendant should not be twice punished for the same offense.[f] In North Carolina and Texas, evi-

[a] Huftalin *v.* Misner, 70 Ill. 55.

[b] Brown *v.* Evans, 8 Sawy. 488; Grable *v.* Margrave, 4 Ill. 372; Jacobs *v.* L. & N. R.R. Co., 10 Bush 263; Sloan *v.* Edwards, 61 Md. 89; M'Carthy *v.* Niskern, 22 Minn. 90; Peck *v.* Small, 35 Minn. 465; Whitfield *v.* Westbrook, 40 Miss. 311; Buckley *v.* Knapp, 48 Mo. 152; Belknap *v.* B. & M. R.R. Co., 49 N. H. 358; Johnson *v.* Allen, 100 N. C. 131; Hayner *v.* Cowden, 27 Oh. St. 292; McBride *v.* McLaughlin, 5 Watts 375; Dush *v.* Fitzhugh, 2 Lea 307; Rea *v.* Harrington, 58 Vt. 181; Harman *v.* Cundiff, 82 Va. 239; Birchard *v.* Booth, 4 Wis. 67; Meibus *v.* Dodge, 38 Wis. 300; Winn *v.* Peckham, 42 Wis. 493; Brown *v.* Swineford, 44 Wis. 282; Lavery *v.* Crooke, 52 Wis. 612; Hare *v.* Marsh, 61 Wis. 435; Spear *v.* Hiles, 67 Wis. 350; but *contra*, Guengerech *v.* Smith, 34 Ia. 348.

[c] Mullin *v.* Spangenberg, 112 Ill. 140; Rea *v.* Harrington, 58 Vt. 181.

[d] Johnson *v.* Smith, 64 Me. 553. [e] Grable *v.* Margrave, 4 Ill. 372.

[f] Murphy *v.* Hobbs, 7 Col. 541; Huber *v.* Teuber, 3 McA. 484; Cherry *v.* McCall, 23 Ga. 193; Taber *v.* Hutson, 5 Ind. 322; Butler *v.* Mercer, 14 Ind. 479; Nossaman *v.* Rickert, 18 Ind. 350; Humphries *v.* Johnson, 20 Ind. 190; Meyer *v.* Bohlfing, 44 Ind. 238; Ziegler *v.* Powell, 54 Ind. 173; Stewart *v.* Maddox, 63 Ind. 51; Farman *v.* Lauman, 73 Ind. 568; Austin *v.* Wilson, 4 Cush. 273; Fay *v.* Parker, 53 N. H. 342.

dence of a conviction and fine paid may be given for the purpose of mitigating exemplary damages, but does not bar the claim altogether as a matter of law;([a]) in Quebec it is an absolute bar to exemplary damages.([b]) Everywhere else it is held that the fact that the defendant is liable to a criminal prosecution or has actually paid a fine to the State can neither bar nor mitigate exemplary damages.([c])

In the case of Fry *v.* Bennett,([d]) which was an action of libel, Mr. Justice Hoffman maintained, with much force, that there was a clear difference between the particular injury to the plaintiff (independently of his pecuniary damage) by the defendant's wrongful act, and the injury caused by the same act to society at large, contending that penalties for each, although both pecuniary, might be inflicted without injustice to the defendant.

In Illinois an attempt was made at one time to distinguish between exemplary and punitive damages, and to hold that the former can, but the latter cannot, be given where the act is punishable as a crime.([e]) The attempted

([a]) Smithwick *v.* Ward, 7 Jones L. 64; Johnston *v.* Crawford, 62 N. C. (Phillips) 342; Sowers *v.* Sowers, 87 N. C. 303; Flanagan *v.* Womack, 54 Tex. 45; Shook *v.* Peters, 59 Tex. 393.

([b]) Guest *v.* Macpherson, 3 Leg. News 84.

([c]) Brown *v.* Evans, 8 Sawy. 488; Phillips *v.* Kelly, 29 Ala. 628; Wilson *v.* Middleton, 2 Cal. 54; Bundy *v.* Maginess, 76 Cal. 532; Jefferson *v.* Adams, 4 Harr. 321; Smith *v.* Bagwell, 19 Fla. 117; Hendrickson *v.* Kingsbury, 21 Ia. 379; Garland *v.* Wholeham, 26 Ia. 185; Guengerich *v.* Smith, 36 Ia. 587; Reddin *v.* Gates, 52 Ia. 210; Chiles *v.* Drake, 2 Met. (Ky.) 146; Slater *v.* Sherman, 5 Bush 206; Johnson *v.* Smith, 64 Me. 553; Elliott *v.* Van Buren, 33 Mich. 49; Boetcher *v.* Staples, 27 Minn. 308; Wheatley *v.* Thorn, 23 Miss. 62; Corwin *v.* Walton, 18 Mo. 71; Cook *v.* Ellis, 6 Hill 466; Sowers *v.* Sowers, 87 N. C. 303; Roberts *v.* Mason, 10 Oh. St. 277; Barr *v.* Moore, 87 Pa. 385; Wolff *v.* Cohen, 8 Rich. L. 144; Cole *v.* Tucker, 6 Tex. 266; Edwards *v.* Leavitt, 46 Vt. 126; Klopfer *v.* Bromme, 26 Wis. 372; Brown *v.* Swineford, 44 Wis. 282; Corcoran *v.* Harran, 55 Wis. 120.

([d]) 4 Duer 247.

([e]) Freese *v.* Tripp, 70 Ill. 496; Meidel *v.* Anthis, 71 Ill. 241.

distinction was, however, as will be seen from cases already cited, immediately abandoned by the court.

§ 387. **Relations of court and jury in awarding exemplary damages.**—Whether there is any evidence to justify the assessment of exemplary damages is a question for the court, and if there is none, it is error to submit the question of exemplary damages to the jury.([a]) Where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury; ([b]) and it is error to instruct the jury to give exemplary damages, for the plaintiff can never claim them as a matter of law.([c]) So it is error, when the facts are in dispute, to instruct the jury that "this is one of the cases where they may give exemplary damages."([d]) It is, however, held in Iowa that the Civil Damage Act gives the plaintiff a right to exemplary damages, and the court should therefore, in a proper case, instruct the jury to give them.([e])

In Wisconsin, in a case of assault and battery, an instruction to the jury that "if the assault was committed in an insulting manner, wilfuly and maliciously, with an

([a]) Selden *v.* Cashman, 20 Cal. 56; Chicago, S. L. & N. O. R.R. Co. *v.* Scurr, 59 Miss. 456; Rose *v.* Story, 1 Pa. St. 190; Amer *v.* Longstreth, 10 Pa. St. 145; Pittsburgh S. Ry. Co. *v.* Taylor, 104 Pa. 306; Phila. Traction Co. *v.* Orbann, 119 Pa. 37; Bradshaw *v.* Buchanan, 50 Tex. 492.

([b]) Pratt *v.* Pond, 42 Conn. 318; Dye *v.* Denham, 54 Ga. 224; Johnson *v.* Smith, 64 Me. 553; Smith *v.* Thompson, 55 Md. 5; Chicago, S. L. & N. O. R.R. Co. *v.* Scurr, 59 Miss. 456; Graham *v.* Pacific R.R. Co., 66 Mo. 536; Nagle *v.* Mullison, 34 Pa. 48.

([c]) Hawk *v.* Ridgway, 33 Ill. 473; Wabash, St. L. & P. Ry. Co. *v.* Rector, 104 Ill. 296; Louisville & N. R.R. Co. *v.* Brooks, 83 Ky. 129; Southern R.R. Co. *v.* Kendrick, 40 Miss. 374; N. O., St. L. & C. R.R. Co. *v.* Burke, 53 Miss. 200; Jerome *v.* Smith, 48 Vt. 230; Boardman *v.* Goldsmith, 48 Vt. 403; Snow *v.* Carpenter, 49 Vt. 426. But *contra*, Mayer *v.* Duke, 72 Tex. 445.

([d]) Pickett *v.* Crook, 20 Wis. 358.

([e]) Fox *v.* Wunderlich, 64 Ia. 187; Thill *v.* Pohlman, 76 Ia. 638.

intent to injure the plaintiff's feelings, and disgrace him in the estimation of the public," they *ought* to give punitory damages, was held not to be error.[a] On the other hand, the jury must not be restricted by a direction not to give exemplary damages, if they believe from the evidence that the defendant's trespass was malicious.[b]

§ 388. **Power of the jury over the amount of exemplary damages—Power of the court.**—The amount of exemplary damages is entirely within the discretion of the jury.[c] But where the highest value of a house torn down and removed by the defendant, testified to by any witness, was $250, and the court instructed the jury that, if they found it a case for exemplary damages, they might find a verdict for any amount not exceeding the sum laid in the declaration, which was $2,000, and the jury found a verdict for $567, it was set aside on the ground that this instruction might have wrongly influenced them as to the amount of damages, as a verdict for the amount laid in the declaration would have warranted the inference of prejudice, partiality, or corruption on their part.[d] An instruction that they might give such damages as would satisfy the highly excited feelings of the plaintiff was held erroneous.[e]

The verdict can be set aside by the court only when it is grossly excessive, or evidently actuated by passion, prejudice, or undue influence.[f] The case of New

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[a] Hooker *v.* Newton, 24 Wis. 292.

[b] Devaughn *v.* Heath, 37 Ala. 595.

[c] C. R.R. Co. *v.* Scurr, 59 Miss. 456; Borland *v.* Barrett, 76 Va. 128.

[d] Bryan *v.* Acee, 27 Ga. 87; Willis *v.* McNeill, 57 Tex. 465.

[e] Jones *v.* Turpin, 6 Heisk. 181.

[f] Flannery *v.* B. & O. R.R. Co., 4 Mack. 111; Cutler *v.* Smith, 57 Ill. 252; Farwell *v.* Warren, 70 Ill. 28; Collins *v.* Council Bluffs, 35 Ia. 432; Goetz *v.* Ambs, 27 Mo. 28; Borland *v.* Barrett, 76 Va. 128; Rogers *v.* Henry, 32 Wis. 327.

Orleans, J. & G. N. R.R. Co. *v.* Hurst ([a]) would seem to carry the principle of exemplary damages to its extreme limit. The jury having, in that case, found a verdict of $4,500 against a railroad company for the misconduct of a conductor in carrying the plaintiff four hundred yards beyond the station, and refusing to return, so that, to avoid being taken to the next station, he had to walk back, carrying his valise, the court, while regretting the rigor of the jury, refused to set aside the verdict, saying that the law in such cases furnished "no legal measurement save their discretion." In this case, we think, with deference, that the verdict might with great propriety have been set aside. The amount warranted the presumption of undue bias.

In Louisiana, in cases proper for exemplary damages, the jury are still under the control of the court in regard to the extent to which they may go, and, in an action for malicious arrest and imprisonment, the court said: "Exemplary damages should nevertheless be commensurate to the nature of the offense, and when extravagant damages are allowed, they will be reduced to their proper standard."([b])

The power of the court to set aside a verdict for exemplary damages is the same power, and is exercised upon the same principle, as in any case of excessive verdict.([c]) Its effect upon the allowance of exemplary damages is to prevent the severe and arbitrary consequences that might otherwise result from the doctrine, and so to meet the principal objection to the allowance of exemplary damages: namely, that it gives the jury an arbitrary and unrestricted power over the property of defendants.

([a]) 36 Miss. 660.

([b]) Burkett *v.* Lanata, 15 La. Ann. 337; *acc.* Fitzgerald *v.* Boulat, 13 La. Ann. 116.

([c]) See chapter upon Powers of Court and Jury.

CHAPTER XII.

LIQUIDATED DAMAGES.

§ 389. Amount of damages stipulated by the parties.
390. Debt on bond.
391. Damages within the penalty.
392. Assignment of breaches.
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394. Liquidated damages and penalty.
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421. Alternative contracts—Rule of beneficial alternative.
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423. Ordinary rule.
424. General conclusions as to alternative contracts.
425. Stipulation of damages strictly construed.
426. Consequences of liquidating damages.
427. Civil law.

§ 389. **Amount of damages stipulated by the parties.**—We now come to a class of cases where the contracting parties fix or liquidate the amount that shall furnish the measure of compensation in case of non-fulfilment of the agreement, either in the shape of a penalty or of

stipulated damages. * The questions arising under this branch of our subject were formerly generally presented in one of the two common-law actions known as debt and covenant; but we shall endeavor to consider the matter at large, without confining ourselves strictly to either of these technical forms.

At the same time, it is impossible altogether to dismiss them from view. The common-law action of *debt* was applicable in all cases where a sum certain was due, whether the contract was by parol, under seal, or of record; while *covenant* was the remedy for breaches of all contracts under seal, whether for sums certain or uncertain. And owing to this arbitrary division of actions, the rules of damages still conform in many cases rather to the remedy than the right; we must, therefore, not lose sight of this technical distinction.

§ 390. **Debt on bond.**—Of all forms of debt, that of debt on bond was the most frequent. In the early periods of our jurisprudence debt was the common action for goods sold and delivered, and for work and labor done; but it was subsequently to a great extent superseded by the proceeding in assumpsit.[1]

It is true, as a general rule, that in the action of debt, which was brought for the recovery of a sum certain, no damages could be claimed on account of the debt itself, this being recoverable *in numero;* but damages were given on account of the detention of the debt. In an action of debt on bond, therefore, only nominal damages were assessed, nor was it in general necessary to have them assessed to the amount even of what was due for interest, because, as under the verdict, the plaintiff was entitled to the whole penalty; this, which is double the

[1] Rudder *v.* Price, 1 H. Bl. 547.

sum mentioned in the condition, was usually sufficient to cover what was due for interest.

The form of the *obligation* or *bond* of the English law is technical and peculiar. The obligor *binds*, or *obliges* himself to pay a certain sum of money, at a certain time, to the obligee. This, if under seal, would be a single bond, or *simplex obligatio;* and would only differ from a note, in being under seal, and not negotiable. But in the bond we find a clause appended, declaring that the previous obligation shall be void on the payment of some lesser sum of money, or the performance of some particular act. The latter part, or *condition*, of the bond, is that which discloses the real nature of the contract, and contains its essence; the former part is the *penalty*.[1] *Penal obligations* are well known to other systems of law besides our own;[2] but the precise form of contract by which an absolute obligation is at first declared, and this converted into a mere penalty by the addition of a subsequent condition, is entirely peculiar to the English law.

From this form of obligation or contract, various results, flowing from the technical rules of the common law, were deduced by the founders of our jurisprudence. If the condition was not strictly complied with, as in regard to the payment of money on a day certain, the moment the day was passed the penalty became the debt, and was at law recoverable; and neither payment nor tender after the day would avail, because a condition once broken was gone forever. If the condition were to do anything other than pay money, and were not fulfilled, the penalty again became the debt, and was recoverable without any reference whatever to the actual damages incurred. Hence many difficulties arose. Lord

[1] Black. Com. ii, ch. 20, p. 340.

[2] Pothier, Traité des Obligations, part ii, ch. v, des Obligation Pênales.

Kaimes says,[1] that the bond was introduced originally to evade the common law of England, which prohibited the taking interest for money. Whatever reason led to its introduction, certain it is, that its peculiar form has occasioned infinite doubt and contradiction.**

§ 391. **Damages within the penalty.**—* The action of debt, as has been said, was the usual remedy provided by the common law for the recovery of a sum certain. And in an action of debt for condition broken, the amount of the plaintiff's recovery was originally, as has also been said, the penalty; nor could the action be relieved against, either by payment or tender: no defense would avail but a release under seal. And this severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed, and would not allow a man to take more than in conscience he ought.[2] It became early settled in equity, that the condition of the bond was the agreement of the parties, and as such the obligor was relieved from the penalty.[3] Lord Somers said,[4] "that where the party might be put in as good a plight as where the condition itself was literally performed, there the Court of Chancery would relieve, though the letter of it were not strictly performed, as payment of money, etc. But where the condition was collateral and in recompense, and no value could be put on the breach of it, then no relief could be had for the breach of it." This practice was followed by the common-law tribunals, which ordered the proceedings to be

[1] Prin. of Equity, book iii, ch. ii, p. 279.

[2] Black. Com. book ii, ch. 20, p. 341. For cases of this description in chancery, see Hale *v.* Thomas, 1 Vern. 349, and Stewart *v.* Rumball, 2 Vern. 509; also, Duvall *v.* Price, Show. Par. Cas. 15; Bond and Penalty, Abr. Eq. 91, 92.

[3] Acton *v.* Peirce, 2 Vern. 480: Cannel *v.* Buckle, 2 P. Wms. 243; Watkyns *v.* Watkyns, 2 Atk. 96; Bishop *v.* Church, 3 Atk. 691; Parks *v.* Wilson, 10 Mod. 515; Hobson *v.* Trevor, 2 P. Wms. 191; Chilliner *v.* Chilliner, 2 Ves. 528; Collins *v.* Collins, 2 Burr. 820. See Pothier, by Evans, on Penal Obligations, appendix, and Fonblanque's Treatise on Equity.

[4] Prec. in Ch. 487.

stayed upon bringing into court the principal debt, interest, and costs.[1] Finally, this discretionary power was confirmed by a statutory regulation, which provided that in actions on bonds with penalties, the defendant might bring in the principal debt, interest, and costs, and be discharged.[2]

This legislation was followed in this country. In New York,[3] it was declared that, in actions on penalty bonds, the plaintiff might plead payment of the debt made before suit brought, though not according to the condition; and that after suit brought, the defendant might bring debt, principal, and costs into court, and that thereupon the action should be discontinued. Speaking of the English original of this statute, Lord Mansfield said :[4]

"That it was made to remove the absurdity which Sir Thomas More unsucessfully attempted to persuade the judges to remedy in the reign of Hen. VII.; for he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs, and when they said they could not relieve against the penalty, he swore by the body of God he would grant an injunction."

And in another case,[5] he said :

"It was extraordinary that after it was settled in *equity* that the forfeiture might be saved by the performing the intent, and that this was the nature of a bond, the courts of law did not follow equity, but still continued to do *injustice as of course*, and put the parties to the delay and expense of setting it right *elsewhere as of course*."[6]

[1] Gregg's Case, 2 Salk. 596; Anon. 6 Mod. 11; Butler *v.* Rolfe, Ibid. 25; Anon. Ibid. 29; Burridge *v.* Fortescue, Ibid. 60, and Ireland's Case, Ibid. 101. In Burridge *v.* Fortescue, the court said: "It is an equitable motion, to be relieved against the penalty."

[2] 4 and 5 Anne, ch. 16, §§ 12 and 13.

[3] Rev. Stat. vol. ii, p. 353, §§ 12 and 13, superseded by the provisions of the Code Civ. Proc., § 1915.

[4] Wyllie *v.* Wilkes, 2 Doug. 519.

[5] Bonafous *v.* Rybot, 3 Burr. 1370, 1374.

[6] In this last case it was held that bonds conditioned for payment of money by instalments were within the act of 4 Anne.

§ 392. **Assignment of breaches.**—Notwithstanding this statute, however, it is apparent that great injustice might be committed, because the plaintiff was entitled to judgment for the whole amount of the penalty, and the defendant could only be discharged by addressing himself to the equitable consideration of the court. Hence was imposed the obligation to *assign breaches.* By a statute enacted at nearly the same time,[1] it was declared "that in all actions, etc., upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing certain, the plaintiff or plaintiffs *may* assign as many breaches as he or they shall think fit; and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of said breaches so to be assigned as the plaintiff on the trial of the same shall prove to have been broken." The language here is, that the plaintiff *may* assign breaches; but it was settled that the statute was compulsory,[2] and that a judgment obtained under the former practice of the common law was bad in error. In the case last cited, Lord Kenyon and Mr. J. Buller said:

"It is apparent to us that the law was made in favor of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what is in conscience due; and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only had accrued."

And it was accordingly held, that the plaintiff *must*

[1] 8 and 9 Will. III. ch. xi, § 8.

[2] Roles *v.* Rosewell, 5 T. R. 538, and Hardy *v.* Bern, Ibid. 636.

assign breaches, and that the jury *must* assess the damages.

The principles of this act were engrafted upon the legislation of this country. In New York it was provided:[1]

"When an action shall be prosecuted in any court of law, upon any bond, for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff *in his declaration* shall assign the specific breaches for which the action is brought.

"Upon the trial of such action if the jury find that any assignment of such breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them.

"In every such action, if the plaintiff recover, the verdict of the jury assessing the plaintiff's damages shall be entered on the record, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited as in other actions of debt, together with costs of suit; and with a further judgment that the plaintiff have execution to collect the amount of the damages so assessed by the jury, which damages shall be specified in such judgment."

§ 393. Only the plaintiff's actual loss recoverable under the penalty.—These two statutes together produced this reasonable and equitable result, that in the case of an agreement to do or refrain from doing any particular act secured by a penalty, the amount of the penalty was in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by the jury. It, therefore, became a settled rule that no other sum can be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss.(a)

[1] Revision of 1813 (R. Laws, vol. i, p. 518), and Revised Statutes, vol. ii, p. 300, 2d ed.; 378, 1st ed. Now superseded in New York by the provisions of the Code Civ. Proc., § 1915.

(a) Consequently where a judgment has been recovered in one State for the

In the action of debt on bond, however, judgment still goes for the penalty, owing to the technical rule, that in this action the entire sum is demanded, and the penalty is the debt, according to the express terms of the instrument; this, however, is corrected by the practice which forbids the execution to issue for more than the sum really due.**

§ 394. **Liquidated damages and penalty.**—In speaking of the subject of damages with regard to the action of debt on bond, we have stated that the peculiar form of that instrument fixes a penalty subject to a certain condition. We have now to consider the same matter in another sense.

* It is competent for parties entering upon an agreement to avoid all future questions as to the amount of damages which may result from the violation of the contract, and to agree upon a definite sum, as that which shall be paid to the party who alleges and establishes the violation of the agreement.[1] In this case the damages so fixed are termed *liquidated, stipulated, or stated* damages. But even where this course has been adopted, and a sum certain named in the contract, difficulty has arisen as to whether it should be considered as such liquidated

[1] A provision of this nature has been engrafted on charter-parties, and is familiarly known as demurrage.

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amount of the penalty of a bond, a plaintiff suing on such judgment in another State can recover the amount of damages only for which execution was awarded in the original suit. Battey *v.* Holbrook, 11 Gray 212. In an action of debt on bond, conditioned for the support of the plaintiff and her husband during their lives, it was held that damages must be assessed so as to cover not only present but prospective loss. The decision being based on the ground that as the bond contained no covenant and there could be but one breach, the plaintiff was entitled to have all her damages assessed on the trial. Philbrook *v.* Burgess, 52 Me. 271.

damages, or only as a penalty.[1] It being settled by the courts, both of equity and law, that a penalty was only intended as a security for the principal sum due, or the actual damages sustained, it became doubtful, even when a definite sum was named, whether the parties intended it for that purpose, or whether it was meant as liquidated damages, behind which the courts could not go; and on this subject various cases have been decided.

§ 395. **Classification of the subject.**—It is proper, however, before we examine these cases, to notice a distinction as to the way in which the question presents itself, growing out of the form of the contract, from want of a constant attention to which part of the confusion has arisen.

First. The agreement may, in the first place, be to do or refrain from doing some particular act, or in default thereof, to pay a given sum of money; and this was well known to the Roman law. So the imperial legislator advises his subjects in making contracts for the doing of anything, to fix the amount of damages by inserting a precise stipulation to that effect: *Non solum res in stipulationem deduci possunt, sed etiam facta: ut si stipulemur aliquid fieri vel non fieri. Et in hujusmodi stipulationibus optimum erit pœnam subjicere, ne quantitas stipulationis in incerto sit, ac necesse sit actori probare quid ejus intersit. Itaque si quis, ut fiat aliquid, stipuletur ita adjici pœna debet: si ita factum non erit, tunc pœnæ nomine decem aureos dare spondes.*[2] This, as Lord Kaims clearly points out,[3] is properly an alternative

[1] The word *penalty* is in this contradistinction not very correct or significant; the word designates a sum absolutely due in case of the non-performance of an agreement, quite as clearly as the phrase *liquidated damages*. But the term has now acquired a fixed and well-settled technical meaning.

[2] Inst. lib. iii, tit. xv, de Verb. Oblig. section 7. Vinnius, in his commentary on this section, discusses the subject of the measure of damages, and its necessary uncertainty in many cases: *Est vero id quod interest incertum duplici ratione, ab eventu ipsius rei, et a probatione.* Vinn. Comm. p. 606.

[3] Kaims' Equity, book iii, ch. ii, p. 277.

obligation, and the sum stated cannot be correctly termed a penalty.

Secondly, the agreement may assume the technical form of the bond, containing a declaration of an absolute indebtedness in a given sum, conditioned to become void on the payment of a less sum, or the performance of some particular act. Here there is no express promise or undertaking to do anything. The indebtedness declared in the prior part of the instrument is not intended to be binding. The promise relied on is contained in or implied from the condition, and that is sanctioned by the penalty.

Thirdly, the agreement may bind the party absolutely to do, or refrain from doing, the particular act, and then proceed to declare that if the promise is not performed, the party stipulating shall pay a given sum of money as a *penalty*.

And *lastly*, the agreement may in all respects resemble the last, except that the fixed sum may be declared payable as *liquidated or stated damages*, or as a *forfeiture*.

§ 396. **General observations.**—Before proceeding to examine the cases, some few general observations may be of use to serve by way of introduction and illustration. Whenever questions of the nature we are now considering present themselves, the attention of the courts is mainly fixed on three different points: First, the language employed; second, the subject-matter of the contract; and third, the intention of the parties. These are, indeed, the great elements of interpretation of all contracts. But in the case we are now examining, the courts, especially in this country, have generally shown a marked desire to lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained. The language of the contract is not controlling.

And such, it seems, was the disposition of the civil law in the somewhat analogous case of the *stipulatio duplex: Quæ scrupulositates et differentiæ procedunt propter odiositatem strictamque naturam stipulationis duplæ, quæ stricti juris est, contra quam etiam in dubio fit interpretatio. Contra, vero, actio ex empto bonæ fidei est, et etiam favorabilis, cum non competat ad veram pœnam, sed subsistere et probari oportet, verum et justum interesse, merito in ea plenior fit interpretatio.*[1]

The subject-matter of the contract, and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties.(a)

§ 397. **Early English cases.**—The earliest notice of the general subject appears to be in Sir Baptiste Hixts' case,[2] which is as follows:

"In an action of covenant, if the plaintiff counts that in an agreement for certain lands between plaintiff and defendant, the defendant covenanted that if, on measurement, there was not found as many acres as the defendant had stated to the plaintiff at the time of sale, he would repay for each acre wanting £11

[1] Dumoulin, de Eo quod Int. § 123. [2] 2 Rolle Abr. 703, tit. Trial.

(a) It is to be observed that the plaintiff, as well as the defendant, has the right to show that the stipulated sum is a penalty, and to prove the actual damages, though they are greater than the penalty. In other words, when the performance of a contract is secured by a penalty the amount of damages upon breach is not limited to the penalty. Noyes *v.* Phillips, 60 N. Y. 408.

per acre, and avers that, on measurement, as many acres were wanting as would, at £11 per acre, amount to £700; and issue being joined whether they were wanting, and the jury find for the plaintiff, and give £400 damages, this issue is well found for the plaintiff; for although it were found that all the acres were wanting, still *they are chancellors*, and may give such damages as the case requires in equity, inasmuch as the whole consists in giving damages."

To this decision we have already referred, as being strikingly illustrative of the laxity of all the early cases on the subject of compensation.[1]

In the next case in which the subject was discussed,[2] the plaintiff had executed a bond in £100 penalty to the Duke of Beaufort, that his son should not poach on the duke's grounds without leave from the gamekeeper, or unless in company with a qualified person. The son afterward fished; the bond was put in suit, the penalty of £100 recovered, and paid by the plaintiff, with £40 costs of suit. This bill was filed for relief. It was insisted that the bond was only given as a security that the son should not poach; but Lord Chancellor Hardwicke said: "It is most absurd to think that bonds of this kind were intended merely as a security," and asked: "In what respect is the gentleman who has such a bond in a better condition than he was before, if after obtaining judgment at law, a court of equity will give him no other satisfaction than the bare value of the price of the game that is killed?"

[1] In a subsequent case, Lowe *v.* Peers, 4 Burr. 2225, 2229, Lord Mansfield said: "As to the case mentioned by Mr. Mansfield, from Rolles Abr., it is impossible to support it; for it cannot be that a man should be obliged to take less than the liquidated sum. And the writ of error in that case was plainly brought by the defendant. Besides, the damages could never be taken advantage of upon a writ of error. How could the *quantum* of damages found by the *jury* be the subject of a *writ of error?*"

[2] Roy *v.* The Duke of Beaufort, 2 Atk. 190, decided in 1741. But on the ground that an ill use had been made of the bond, the chancellor relieved the plaintiff against the verdict, and decreed the duke to refund the £100 and £40 damages.

In a case before the same great judge,[1] Aylet had charged certain lands by his will with an amount of ten pounds for the maintenance of a school-master, to be paid half-yearly; and if in arrear forty-two days after due, 5*s.* per week were allotted, by way of *nomine pœnæ*. A commission of charitable uses issued from chancery summoned the owner of the land, who was in default, and awarded the arrears and the *nomine pœnæ*. Exception was taken that, in a court of equity, the *nomine pœnæ* would be relieved against on payment of the actual arrears. Lord Chancellor Hardwicke said that the *nomine pœnæ* should stand, according to the *intention of the parties, as a security for the legal interest.* But he went on to say, that where there is a *nomine pœnæ* in a lease to prevent the tenant from breaking up pasture ground, it is otherwise; for the intention there is to give the landlord a compensation for the damage sustained, and in such case the whole *nomine pœnæ* shall be paid.

And so in a subsequent case,[2] where an increased rent was declared payable, provided land should be plowed up, the agreement was held conclusive on the quantum of damages.[3]

Again,[4] where a bond had been given by the plaintiff Benson, to the defendant, a hair merchant, as a security for his services in Flanders as an agent to buy hair, the plaintiff was to stay abroad a certain time; and as security for his performance he deposited £100 with the defendant. The plaintiff bought but five pounds' worth of hair, and returned to England before the time agreed

[1] Aylet *v.* Dodd, 2 Atk. 238, decided in the same year.

[2] Farrant *v.* Olmius, 3 B. & Ald. 692.

[3] But in Wilbeam *v.* Ashton, 1 Camp. 78, where assumpsit was brought on an agreement to serve the plaintiff as a leather dresser, under a penalty of £50, Lord Ellenborough, at Nisi Prius, said: "The legal construction of such an agreement is this: *beyond* the penalty you shall not go; *within* it, you are to give the party any compensation which he can prove himself entitled to."

[4] Benson *v.* Gibson, 3 Atk. 395 (1647).

on. The bill was filed for £50 per annum, agreed to be paid by the defendant to the plaintiff, and also to recover back the deposit. It was insisted that the plaintiff had committed a breach, that the £100 was stated damages; and the previous cases, of the *nomine pœnæ* in leases and the poaching bond, were cited; but Lord Hardwicke said that this was a bond for services only, and refused to decree the penalty, but directed an issue of *quantum damnificatus*.

In a subsequent case,[1] the plaintiff demised certain lands in Ireland, for three lives, at the yearly rent of £125, with a condition, that if the tenant should not live on the premises, the rent should be raised to £150. The tenant violated the condition by non-residence. The landlord distrained; the tenant replevied; the landlord avowed; and while the proceedings at law were going on, the tenant filed his bill for a perpetual injunction. The Irish court granted an injunction. An appeal was taken to the House of Lords, where it was insisted that the covenant was only inserted for the sake of improvement, and that it was admitted by the pleadings that the lands had been kept well stocked, and that the agreement had been substantially performed. But the bill was dismissed. No reason being assigned, the case is altogether unsatisfactory; and if it was intended to decide that the covenant should be considered as one for stipulated damages, it would seem incorrect.

Again,[2] where the appellant Rolfe demised certain lands, with a covenant on the part of the lessee, that if he, during the term, should convert into tillage any part of the ancient meadow ground that had not been in tillage within twenty years, or if he should plow or sow

[1] Ponsonby *v.* Adams, 2 Bro. P. C. 431, case 35 (anno 1770).

[2] Rolfe *v.* Peterson, 2 Bro. P. C. 436, case 42 (anno 1772).

out of course any of the arable lands, then for such lands converted or sown out of course a further rent of £5 should be paid. There were other covenants against cutting trees, etc. The tenant converted certain furze land, which had not been tilled within twenty years, into tillage, and committed breaches of the other covenants; upon which the landlord brought an action of covenant, and, default being made, on a writ of inquiry recovered £300. The respondent (the tenant) filed a bill for relief against the judgment; and Lord Chancellor Camden directed an issue of *quantum damnificatus*, holding that the plaintiff was entitled to relief against the judgment, on making a just and adequate satisfaction for the damages sustained by breach of the covenant. On appeal to the House of Lords, the main question was whether, on an action of covenant by landlord against lessee, and damages assessed by a jury, a court of equity has jurisdiction to direct an issue for reassessing those damages. It was insisted that the estate had been really benefited by the conversion of the furze land into tillage, and that the £300 verdict was outrageous; but the Lords reversed the decree, and dismissed the bill, no reason, however, being assigned. The decision plainly turned on the jurisdiction of chancery, and so far seems evidently right. The true construction of the contract, whether to be regarded as a penalty or liquidated damages, was not passed upon.

Again,[1] where the plaintiff and defendant were partners, and the plaintiff had given the defendant a bond in a penalty of £500 that he, the defendant, should have the use of a particular room, the use of it being refused, the defendant brought suit on the bond. This bill was thereupon filed, praying an injunction, and an issue of

[1] Sloman *v.* Walter, 1 Brown Ch. 418.

quantum damnificatus; and the only question, on a motion to dissolve the injunction before hearing, was whether the penalty was merely intended as a security for the use of the room, or in the nature of assessed damages. Lord Chancellor Thurlow held that it belonged to the former class, and the injunction was retained.[1]

In a case already referred to,[2] the defendant had made a contract, under seal, not to marry any person besides the plaintiff; and if he did, to pay her £1,000 within three months thereafter. The defendant married another woman, and this suit was brought. Under the direction of Lord Mansfield, the jury found a verdict for the £1,000. On a motion for a new trial, the question was raised, whether the jury could give more or less damages than the £1,000; and it was insisted for the defendant that they might, if they saw fit, give less. But Lord Mansfield remarked on the difference between covenants in general, and covenants secured by a penalty or forfeiture, and said: "In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty, after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole; or if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties;* and upon this distinction they proceed in courts of equity." That, in the former, to which this case belonged, even equity would not interfere. "The £1,000 is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of

[1] In the case of Hardy *v.* Martin, cited in notes to this case, the same course was pursued in regard to a bond given by one partner, on the dissolution of a partnership, not to trade; and very rightly. In Astley *v.* Weldon, 2 B. & P. 346, this latter case was referred to by Chambre, J., who said that he was concerned in it, and that Lord Mansfield, at the trial at law, inclined to think it a case of stipulated damages.

[2] Lowe *v.* Peers, 4 Burr. 2225 (1768).

the damages." But the judgment was arrested on account of the invalidity and illegality of the instrument. The doctrine of this decision has been recognized in the English Court of Exchequer, in an action on a covenant not to lop trees, under a given penalty for each tree.[1] The case seems, however, rather that of an agreement to pay a certain sum on a contingency, which contingeney is itself dependent on the choice of the party himself, and belongs more properly to a class of alternative obligations of which we shall have occasion to speak later.

Where[2] a bond had been given by the plaintiff to the defendant in £236, conditioned that certain iron-work should be done by himself and another party for £118 18*s.* within six weeks, and if not, they would "*forfeit and pay*"[3] £10 for every week, till it was finished, the plaintiff brought an action for work and labor against the defendant; and the latter pleaded the bond in question, averred that the work had not been performed within the time limited, nor until four weeks thereafter, and insisted on a set-off of £40. Upon demurrer, it was contended that the £10 was a mere penalty, and could not be set off. But the court said that the sums offered to be set off were liquidated damages, which a court of equity could not relieve against; and Buller, J., said, "It is as strongly a case of liquidated damages as can possibly exist, and is *like the case of demurrage*"; and the demurrer was over-

[1] Hurst *v.* Hurst, 4 Ex. 571.

[2] Fletcher *v.* Dyche, 2 T. R. 32 (1787).

[3] In Tayloe *v.* Sandiford, 7 Wheat. 13, Marshall, C. J., commented on these words, and said, they were not so strongly indicative of a penalty as the word "*penalty*" itself. But in Horner *v.* Flintoff, 9 M. & W. 678, where an agreement was entered into binding the parties in the sum of £100 "as liquidated and settled damages, to be paid and *forfeited*," the Court of Exchequer [Parke, B.] said that the case came within that of Kemble v. Farren, hereafter cited, but was rather stronger; "as the word '*forfeited*' was used, which points to a penalty." And in Cheddick *v.* Marsh, 21 N. J. L. 463, the S. C. of New Jersey said: "When a contracting party stipulates upon a given event to *forfeit and pay* a specified sum, the natural and plain import of the language is, that upon the happening of the contingency he will pay that precise sum, not that it shall stand by way of penalty or security for damages incurred."

ruled. It seems, however, to be rather like the case last cited, a conditional agreement, where the party had his election to do the act or pay the money, and not having done the act, he is to be held as having made his election to pay the money.**

§ 398. **Leading cases—Astley v. Weldon.**—The case which is looked upon as settling the doctrine of liquidated damages in England is Astley *v.* Weldon,[1] *where an agreement was entered into by the defendant to perform for the plaintiff at a theatre, and attend all rehearsals, or pay the established fines for all forfeitures of any kind whatsoever, with a clause that either of the parties neglecting to perform the agreement should pay the other £200. The declaration averred a refusal to perform; plea, non-assumpsit. On trial, a verdict was had for £20, with leave to the plaintiff to enter a verdict for £200, if the court should consider the agreement one in the nature of liquidated damages. Here it will be noticed that the phrase *liquidated damages* was not used, and that if the sum of £200 was not construed as a penalty merely, the non-payment of any one of the fines would have forfeited the whole amount. Lord Eldon, then Lord Chief Justice of the Common Pleas, in delivering the judgment of the court, said that he had felt much embarrassment in ascertaining the principle of the decisions, and that "this appeared to him the clearest principle, that where a doubt is stated, whether the sum inserted be intended as a penalty or not, *if a certain damage, less than that sum, is made payable upon the face of the same instrument in case the act intended to be prohibited be done*, that sum shall be construed to be a penalty"; though the mere fact of the sum being apparently enormous and excessive, would not prevent it from being considered as liquidated damages.

[1] 2 B. & P. 346.

He went on to say: "*Prima facie*, this certainly is contract, and not penalty, but we must look to the whole instrument"; and it was held a penalty.

This case of Astley *v.* Weldon was subsequently cited with approbation;[1] and there is no doubt, according to the suggestion of Lord Eldon, that the form of the instrument may make some difference; as, if it be a bond, the presumption will be that the greater sum is intended merely as a penalty. This is not, however, the necessary construction of such an instrument.

§ 399. **Kemble v. Farren.**—The doctrine laid down in Astley *v.* Weldon was applied in a subsequent case,[2] to a very similar state of facts. The defendant had agreed with the plaintiff to act as principal comedian at Covent Garden, and to conform to its rules; the plaintiff was to pay £3 6*s.* 8*d.* every night that the theatre should be open; and the agreement contained a clause, that if either party failed to fulfil his agreement, or any part thereof, or any stipulation therein contained, such party to pay the sum of £1,000; to which sum it was agreed that the damages should amount, and which sum was declared by the parties to be *liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.* The breach alleged, was a refusal to act during the second season, and the jury gave a verdict for £750. A motion was made to increase this verdict to £1,000, on the ground that that sum was the amount liquidated by the parties; but it was denied, and Tindal, C. J., said:

"It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty or in the nature thereof. And if the

[1] Street *v.* Rigby, 6 Ves. 815.

[2] Kemble *v.* Farren 6 Bing. 141, 147.

clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1,000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6*s.* 8*d.* per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only, which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury; but we can only say, if such is the intention of the parties, they have not expressed it, but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case in principle from that of Astley *v.* Weldon, in which it was stipulated that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200, to be recovered in his Majesty's courts at Westminster."

The authority of this case has been repeatedly recognized. So in a case in the Court of Exchequer, where the sum named was held a penalty only, Parke, B., said:

"When parties say that the same ascertained sum shall be paid

for the breach of any article of an agreement, however minute and unimportant, they must be considered as not meaning exactly what they say, and a contrary intention may be collected from the other parts of the agreement. The rule laid down in Kemble *v.* Farren, was, that when an agreement contains several stipulations of various degrees of importance and value, a sum agreed to be paid by way of damages for the breach of any of them, shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary."[1] **

§ 400. **Early New York cases.**—* The decisions in this country are now to be examined. Our courts will be found generally to be inclined to treat a fixed sum as a penalty, and to hold that the real damages are to be inquired into. Thus,[2] where the plaintiff had agreed to convey to the defendant seven hundred acres of land in exchange for a farm, valued at $3,750, with a further covenant that in case of failing, the party not fulfilling the covenant "should pay to the other party the sum of $2,000 damages," the Supreme Court of New York held this to be a penalty; and stress was laid on the great discrepancy between the value of the property to be exchanged, and the damages for not fulfilling the contract.

Where an agreement had been made[3] by which the defendant covenanted, on the first of January then next, to convey certain lands, and the plaintiff agreed to pay the price, $1,250, on the delivery of the deed, and in case of failure, they bound themselves each to the other in the sum of $500, which they consented to fix and liquidate as the amount of damages to be paid by the failing party; in this case it was held to be too clear for

[1] Horner *v.* Flintoff, 9 M. & W. 678. See, also, Boys *v.* Ancell, 5 Bing. N. C. 390; Beckham *v.* Drake, 8 M. & W. 846; reversed on another ground, 11 M. & W. 315; Edwards *v.* Williams, 5 Taunt, 247.

[2] Dennis *v.* Cummins, 3 Johns Cas. 297.

[3] Hasbrouck *v.* Tappen, 15 Johns. 200.

question ; and the sum of $500 was to be regarded as liquidated damages. The plaintiff having by parol enlarged the time for the delivery of the deeds (although to no fixed day), it was insisted that such extension was a waiver of the liquidated damages, and that the plaintiff could only recover his actual loss; but the court held otherwise, and that the stated sum was still to be the measure of compensation.

In all cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear from the contract that they were to be paid and received absolutely in lieu of performance ; and it is also settled here, as we shall see, in England,[1] that a covenant on a certain contingency to pay to another person a sum of money, with a provision that if he fails, then to pay a larger sum as liquidated damages, might be wholly incompatible with our laws in restraint of usury.

Both these points were ruled in a case[2] already referred to, where the plaintiff had made a bond and mortgage to a third party in the sum of $5,000, which had been assigned to the defendant, and a covenant was then entered into between them, that three several farms belonging to the plaintiff and covered by the mortgage, should be appraised by arbitration ; that if their value fell short of the defendant's claim he should have them (*i. e.*, the three farms); if they exceeded his demands, he should pay the balance, with a stipulation that either party failing should forfeit to the other $500 as liquidated damages. The farms were assessed, a balance found in favor of the plaintiff, and the defendant refused to pay. The sum of $500 was claimed ; and the defendant admitted that he was bound to pay that sum as

[1] In Orr *v.* Churchill, 1 H. Black. 227. [2] Gray *v.* Crosby, 18 Johns. 219.

liquidated damages, but insisted that on such payment, the whole agreement was to be rescinded; and as his $5,000 bond remained due, he offered to offset the $500 against the $5,000 due on the bond, and asked that the balance should be certified in his favor. But the jury, under the charge of the court, found a verdict for the plaintiff for the balance fixed by the appraisers; and on a motion for a new trial, this was held right. It was held, so far as the defendant was concerned, that the stipulated damages were not intended in lieu of a performance of anything to be done, nor as an extinguishment of the appraisement itself; and that as to the plaintiff, he could only recover the exact balance due him.

In the same State,[1] a contract to pay three hundred and sixty dollars for twelve cows and twelve calves, in four years, was held to be in the nature of a penalty merely, and that the plaintiff could only recover the value of the cows and calves. And this on the same grounds as in the last two cases.[2]

In a subsequent case,[3] the following facts were presented: By articles of dissolution between the plaintiff's intestate and the defendant, the defendant agreed to pay $3,000 in various instalments, of which the last was one of $750, on the 1st of December, 1812. The articles then recited, that the object was for the intestate entirely to quit the business, and for the defendant to continue it, and that such intention was the basis of allowing the $3,000, and then declared, that in case the intestate should be concerned in or carry on the same kind of business within twenty miles from the present stand, the last instalment should not be paid. The action was for

[1] Spencer *v.* Tilden, 5 Cowen 44.
[2] In Nobles *v.* Bates, 7 Cowen 307, this decision was said to go on the oppressiveness of the contract.
[3] Nobles *v.* Bates, 7 Cowen 307.

the last instalment; in answer to which the defendant proved that the plaintiff's intestate had recommenced the partnership business within four miles. It was insisted that the contract was in the nature of a penalty; but the court said: "A more suitable case for the liquidation of damages by the parties themselves can scarcely be imagined"; and the nonsuit which was directed at the trial was sustained.

The rule laid down in Astley *v.* Weldon, and already stated, that when the agreement contains formal distinct covenants on which there may be divers breaches, some of an uncertain nature, and others certain, with one entire sum specified to be paid on breach of performance, then the contract will be treated as one for a penalty and not liquidated damages, was approved in New York,[1] where a bond was given in the penal sum of $10,000, conditioned that the defendant would not practice as a physician, and if he did, that he should pay $500 for every month that he so practiced. Here the $10,000 was held to be penalty, and the $500 stipulated damages. And the same rule has been laid down in New Jersey.[2]

In a case[3] where the plaintiff had entered into an agreement with the defendants to sell them two lots of ground on certain terms, upon compliance with which the plaintiff was to give a deed, and to this a clause was added, "that if the parties of the second part should fail to perform this contract, or any part therein specified, they will pay the said party of the first part $25, *as liquidated damages*, and give immediate possession to the said party of the first part," the plaintiff brought an action of covenant for breach of the condition. The defendant pleaded tender of $25. But the Supreme Court of New York

[1] Smith *v.* Smith, 4 Wend. 468. See also Spear *v.* Smith, 1 Denio 464.

[2] Cheddick *v.* Marsh, 21 N. J. L. 463.

[3] Ayres *v.* Pease, 12 Wend. 393.

said : " There is nothing in this case which authorizes us to say that it was in the contemplation of the parties that the defendants might relieve themselves from their covenant to pay the price of the land by paying the sum agreed upon as stipulated damages, and surrendering possession"; and the plea was, for this as well as for other reasons, held bad.

Again,[1] where the defendant covenanted to assign to the plaintiff a lease, and to deliver possession thereof, with the following provision : "And I further covenant that, in case of non-performance of any or either of the above covenants, I will forfeit the sum of five hundred dollars, as the liquidated damages to the said Knapp," the same court said : " It is a clear case of liquidated damages, if it is in the power of parties to liquidate them."

§ 401. **Dakin v. Williams.**—The subject was much considered in a subsequent case:[2] the defendant Williams, for $3,000, sold to the plaintiff a newspaper establishment, called the " Utica Sentinel," and all his interest in the subscription, good-will, and patronage of the paper, together with the types, etc., for $500. In consideration of this the plaintiffs on their part covenanted to pay to Williams $3,500, namely, $3,000 for the patronage and good-will, etc., and $500 for the types, etc. And then followed a covenant by which the defendants agreed that they would not establish any paper in the city of Utica, nor suffer any paper to be established in any building owned by them, nor aid nor assist in such publication ; and to this was added a clause binding the defendants to the strict and faithful performance of this covenant, and every part thereof, in the sum of $3,000; and declaring

[1] Knapp *v.* Maltby, 13 Wend. 587.

[2] Dakin *v.* Williams, 17 Wend. 447 ; and s. c. in Error, 22 Wend. 201.

that the said sum of $3,000 should be, and was thereby fixed and settled as liquidated damages, and not as a penal sum for any violation of the preceding covenant, or any of its terms or conditions. The breach alleged was the publication of another paper. The cases which we have been considering were reviewed, and the $3,000 was held to be liquidated damages, both by the Supreme Court and Court of Errors. The Supreme Court held that: It was only the province of the court to inquire into the intent of the parties, and that whether the bargain was wise or foolish was not for them to decide; and went on to say:

"In the case of Astley *v.* Weldon, Lord Eldon repudiates the idea that had been thrown out in some of the previous cases, that if the sum would be enormous and excessive, considered as liquidated damages, it should then be taken as a penalty; and maintains the ability of the party to make a contract for himself in fixing the amount of damages, as well as in respect to any other matter. All the judges adopt the position that the question must be determined upon the meaning and intent of the parties. A principle is stated in that case which has since been frequently applied, and upon which the case was finally disposed of, namely, that where a doubt appears whether the sum inserted be intended as a penalty or not, if a certain damage, less than this sum, be made payable upon the face of the instrument in case the breach occurs, then the same shall be construed to be a penalty. It then partakes of the character of a common money bond, where the payment of a small sum is secured by the forfeiture of a large one in case of default. In that case there were several stipulations in the articles of agreement; and then, on either neglecting to perform on his part, 'the sum of £200, to be recovered in any of his Majesty's courts of record,' was to be paid. Some of the breaches were in their nature uncertain, while others were certain; and as the £200 were given to secure the fulfilment of all of them, upon the principle above stated, the court concluded it was to be deemed in the light of a penalty. Chambre, J., observed, 'That there was one case in which the sum agreed for must always be considered as a pen-

alty: and that is where the payment of a smaller sum is secured by a larger'; and he held that the court could not garble the covenants, and hold that in respect to those *certain* the larger sum was to be deemed a penalty, but damages liquidated as to those *uncertain*, as the concluding clause applied equally to all of them. The decision of the case of Kemble *v.* Farren, the strongest one in the books for the defendants, was put upon this principle by Chief-Justice Tindal. There, some of the strongest stipulations were *certain*, such as the one in which the plaintiff had agreed to pay the defendant £3 6*s.* 8*d.* every night in which the theatre would be open during the season; others were *uncertain*. The language of the parties in fixing the sum in case of neglect to fulfil the agreement or any of the stipulations was as particular and specific as in the case under consideration, using affirmative and negative terms to exclude the idea of a penalty; but as it extended to the breach of every stipulation, those certain as well as those uncertain, the case was supposed to be brought directly within the principle of Astley *v.* Weldon. The chief-justice concedes that it was difficult to suppose words more precise or explicit, and admitted that if the clause had been limited to breaches which were of an uncertain nature and amount, the court would have considered it as having the effect of ascertaining the damages of any such breach at the £1,000; and he adds: 'For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages uncertain in their nature at any sum upon which they may agree.' The case under consideration falls directly within the above distinction; for the concluding clause here, securing the fulfilment of the preceding covenant, applies to stipulations wholly uncertain; and it may be added that, from the nature of the case, it would be impossible for a court and jury to ascertain with any degree of accuracy the amount of damages actually arising out of the breach of them to the prejudiced party; and was, therefore, a very fit and proper case for the liquidation of the amount by the parties themselves. They have adopted the precise sum which the plaintiffs were to receive for the *good-will* and *patronage* of the press—the very benefit which this clause was intended more effectually to secure to the purchasers."[1]

And in the Court of Errors, the chancellor, in pro-

[1] See the doctrine of this case again adopted by Mr. Ch. Walworth, in Shiell *v.* M'Nitt, 9 Paige 101.

nouncing his opinion,[1] laid stress on the fact that, without the stipulation, the damages were wholly uncertain, and incapable of estimation otherwise than by conjecture. In a case in the same State,[2] the preference of the law to construe the stated sum as a penalty, was very strongly declared:

"I do not think that penalties like this (for they are seldom anything other than penalties) should be favored. I yielded my assent to the opinion, in Dakin *v.* Williams, for the reason which there governed the chief-justice, namely, because, on the whole contract, we could not *doubt* the parties intended that the damages should be paid for violating the stipulation in question; and because it was difficult, not to say impossible, from its nature, that the damages for a breach could be ascertained by a jury. The latter may be said of failing to give the five days' notice; but we want the clear intent of the parties, that such an omission was to be punished by such a disproportionate fine. It is evidently upon that clear intent that Dakin *v.* Williams went, and that could the chief-justice have brought himself to doubt, he would never have consented to apply the penalty. It is commonly hard enough in such cases that we should be bound by the letter, though such is the result of the cases where liquidation is impossible. The creditor is a very apt apprentice in the art of enlarging any opening which the law leaves him for encroachment, while the debtor, especially if he be poor or embarrassed, is most complying; and, could he have his way, would prove his own worst enemy. Hence our usury laws, and the system of equitable relief against penalties. To allow the use of penalties as damages, at the unlimited discretion of the parties, would lead to the most terrible oppression in pecuniary dealings. The fair and just rights of the creditor are worthy of all protection, but no more than the debtor's right to exemption from what is beyond an honest compensation to his creditor."

§ 402. **Tayloe v. Sandiford.**— The subject has been considered by the Supreme Court of the United States.[3]

[1] 22 Wendell, 210.

[2] Hoag *v.* M'Ginnis, 22 Wend. 163, 165, *per* Cowen, J.

[3] Tayloe *v.* Sandiford, 7 Wheaton 13, 17.

A written contract was entered into, by which the defendants in error, T. & S. Sandiford, agreed to build for the plaintiff three houses on Pennsylvania Avenue, in Washington. A subsequent contract, under seal, was entered into between the same parties, for the building of three additional houses, "the said houses to be completely finished on or before the 24th day of December next, *under a penalty of one thousand dollars*, in case of failure." The three houses were not finished at the day. The plaintiff in error retained the sum of $1,000, as stipulated damages, out of the money due the defendants in error. This suit was brought; and on the trial the plaintiff in error (the defendant below) offered to set off the $1,000 as stipulated damages, which was not allowed; and the Supreme Court held the charge on this point right, though a new trial was ordered on other grounds. Marshall, C. J., said:

"In general, a sum of money in gross to be paid for the non-performance of an agreement, is considered as a penalty. It will not, of course, be considered as liquidated damages. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention."[1] **

§ 403. **Streeper v. Williams.**—In the case of Streeper *v.* Williams (a) the owner of a hotel had agreed to sell it for $14,000, of which $3,000 were to be paid on a specified day, when the deed was to be signed. Possession of the bar-room was to be given immediately. The parties mutually agreed to "forfeit" $500 in case of failure to

[1] And the court referred to Smith *v.* Dickenson, 3 B. & P. 630; and Fletcher *v.* Dyche, 2 T. R. 32.

(a) 48 Pa. 450, 454.

keep the agreement. The $500 was held to be liquidated damages, and not a penalty. The court, per Agnew, J., in reference to the question under consideration, say:

"Upon no question have courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in reference to its own facts than to any general rule. In the earlier cases the courts gave more weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties; yet the intention is not all-controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages, where it is fixed upon by the parties as the measure of the damages because the nature of the case, the uncertainty of the proof, or the difficulty of reaching the damages by proof, have induced them to make the damages a subject of previous adjustment. In some cases, the magnitude of the sum, and its proportion to the probable consequence of a breach, will cause it to be looked upon as minatory only. Upon the whole, the only general observation we can make is, that in each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case. Equity lies at the foundation of relief in the case of forfeiture and penalties, and hence the difficulty of reaching any general rule to govern all cases."

§ 404. **Bagley v. Peddie.**—In the case of Bagley *v.* Peddie (a) the subject was very thoroughly discussed

(a) 5 Sand. 192, 194; 16 N. Y. 469.

both by the court below and on appeal. The defendant in that case had entered into sealed articles of agreement with the plaintiff, by which he covenanted to abide with the plaintiff four years, and serve him during that time according to his best ability, keep the secrets of the business, not misappropriate any money or property of the plaintiff, keep just accounts of the business, and render such accounts when required.

The Superior Court, in their opinion, stated the following tests for distinguishing between liquidated damages and a penalty :

"1. Where it is doubtful, on the face of the instrument, whether the sum mentioned was intended to be stipulated damages or a penalty to cover actual damages, the courts hold it to be the latter.

"2. On the contrary, where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear, unless the instrument be qualified by some of the circumstances hereafter mentioned.

"3. If the instrument provide that a larger sum shall be paid on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it.

"4. When the covenant is for the performance of a single act or several acts, or the abstaining from doing some particular act or acts which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting, shall pay a stipulated sum as damages for a violation of any of such covenants, that sum is to be deemed liquidated damages, and not a penalty.

"5. Where the agreement secures the performance or omission of various acts of the kind mentioned in the last proposition, together with one or more acts in respect of which the damages on a breach of the covenant are certain or readily ascertainable by a jury, and there is a sum stipulated as damages to be paid by each party to the other, for a breach of any one of the covenants, such sum is held to be a penalty merely."

And the court below considered that two of the cove-

nants in the agreement, one against wrongfully detaining plaintiff's moneys or property, and one requiring the defendant to give a true account of things committed to his management, were clearly certain in their nature, and that damages for their breach might be readily ascertained by a jury. They held, therefore, that the sum payable by the agreement was a penalty. Without apparently disapproving the principles relied on by the Superior Court, the Court of Appeals did not consider these covenants as having the certainty necessary to avoid the stipulation liquidating the damages, but held that the damages to result from a breach of any of the covenants were "uncertain and conjectural," and therefore, maintaining the stipulation as to the damages, reversed the decision because of the erroneous application of a sound principle.

§ 405. **General rule.**—From the foregoing we derive the following as a general rule governing the whole subject. Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages.(a) This rule will be found to be applicable to all contracts, and really involves the consideration of the subject in the three following aspects—that of the intent of the parties; that of the reasonableness of the contract, and that of

(a) Howes *v.* Axtell, 74 Ia. 400; Wakefield *v.* Stedman, 12 Pick. 562; Manice *v.* Brady, 15 Abb. Pr. 173; Westerman *v.* Means, 12 Pa. 97; Powell *v.* Burroughs, 54 Pa. 329; Williams *v.* Vance, 9 S. C. 344; Durst *v.* Swift, 11 Tex. 273; Eakin *v.* Scott, 70 Tex. 442. It may be observed here that any liquidation of damages must have all the essential elements of a contract. "It must have the mutual assent of both parties, and be supported by a sufficient consideration; and if conditional, the condition must be shown to have been performed." Union L. & E. Co. *v.* Erie Ry. Co., 37 N. J. L. 23, 27.

the weight allowed by the court to the language employed.

§ 406. **Intent of the parties.**—The courts will not go outside the contract to ascertain the intention of the parties in entering into it. To do this would often be to violate the elementary maxim that parol evidence cannot be introduced to vary or control a written instrument, and, accordingly, it is well settled that the character of the agreement is a matter of law to be decided by the court upon a consideration of the whole instrument.(a) It is indeed said, in a work of great authority,(b) that the "burden of proof" will be upon the party who contends that the sum named in the contract is stipulated damages "to show that it was intended as such by the parties," but the only case referred to in support of the proposition is Tayloe *v.* Sandiford,(c) where the point was certainly not involved or adjudicated upon. In Moore *v.* Anderson,(d) Prof. Greenleaf's language is cited with approval, but there seems to have been no doubt as to the character of the instrument sued upon. The interpretation of a written contract by the court is, of course, a matter wholly apart from the question of the burden of proof. It may be that the phrase "burden of proof" was used by Prof. Greenleaf to indicate that, in case of doubt, the court would treat the sum fixed by the parties as a penalty; (e) but such a rule would be one of interpretation, not of evidence. Since, therefore, the intention of the parties cannot be gone into as a matter of fact outside the contract, it remains to be considered whether that intention, as expressed *in the contract*, is invariably followed. If it were, there would be no dif-

(a) 2 Taylor Ev., 8th ed., p. 963, § 1132; Sainter *v.* Ferguson, 7 C. B. 716.
(b) 2 Greenl. Ev., 14th ed., p. 267, § 257.
(c) 7 Wheat. 13. (d) 30 Tex. 224. (e) § 408.

ference between the law applicable to these contracts and any others. But it is clear, from the cases already considered, that the intention of the parties is not necessarily the guide. In Kemble *v.* Farren, for instance, where a sum of money fixed by the parties as "liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof," was held by the court to be a penalty, it seems an abuse of language to say that this was in accordance with the parties' intention. The only method of reasoning, by which such a conclusion could be justified, would be that the parties cannot intend to agree upon a sum as stipulated damages when a principle of law makes the agreement futile; but this really begs the question. Clearly, therefore, the intention of the parties does not govern in a large class of cases, and it will be necessary to find some other guide to decide these by. To ascertain this, we must refer to the original equitable doctrine by which the penalty of a bond was avoided. This rested upon the duty of equity to relieve from unjust, unconscionable, and oppressive agreements. This whole equitable jurisdiction, so far as it related to contracts of the class under consideration, is now exercised by courts of law, which, under the guise of interpreting them, actually enforces or refuses to enforce them, as justice requires.

And here we are brought back by a somewhat circuitous path to the great fundamental principle which underlies our whole system: that of compensation. The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake

to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises, as in any other contract, as to what agreement the parties have actually made, and here, as in all other cases, their intention, as ascertained from the language employed, is a guide. It is not, however, conclusive, and the mere use of the word "penalty," "penal," "forfeit," on one side, or "stipulated damages" on the other, will not decide the question. As to the effect of the use of these words, the decisions are often confusing; in most cases where the first class of words are used, the agreement will be found to be of that kind in which the law determines the character of the sum designated; but where the intention of the parties is allowed to govern, there is no reason why the use of a particular word should be of conclusive force.

In Georgia, it has been provided by law that the sum fixed shall be treated as a penalty whenever the damages are "capable of computation." Under this provision, a contract to furnish all the turpentine made on a plantation at a fixed price, and that "either party failing to perform their part forfeits to the other the sum of $1,000," is an agreement for a penalty.[a] It will be seen that this statutory provision is based on the principle of adhesion to the fixed legal standard of compensation, wherever that is possible.

§ 407. **The liquidation must be reasonable.**—The parties,

[a] Lee *v.* Overstreet, 44 Ga. 507.

then, must not only intend that the sum named shall be paid over to the plaintiff upon the breach; the sum must also be reasonable in itself.[a] In other words, in every case where a fixed sum is stipulated as damages, the court will look to see whether the stipulated compensation is a reasonable one; and if not, they will require damages to be assessed as if no stipulated sum were named in the contract. In the words of the Supreme Court of Michigan: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."[b] So firmly is this principle applied that the liquidation provided by a contract may, as the circumstances show to be equitable, in one case be upheld, and in another set aside. Thus in Hahn *v.* Horstman,[c] a case of a common building contract, with stipulated damages at the rate of twenty dollars a day for delay in completing the contract, the defendant left the work unfinished; and the plaintiff, more than a year after the time for completion, brought suit, claiming damages for the whole time at the stipulated rate. If the work had been finished, though a few days after the agreed time, it is well settled, as will be seen, that the stipulated sum could be recovered. In this case, however, to allow recovery at the stipulated rate would be grossly in excess of compensation; and the court refused to allow damages at the stipulated rate.[d]

Some courts say that the damages must not be "grossly

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[a] People *v.* C. P. R.R. Co., 76 Cal. 29; Perzell *v.* Shook, 53 N. Y. Super. Ct. 501; Sleeman *v.* Waterous, 23 Up. Can. C. P. 195.

[b] Marston, J., in Myer *v.* Hart, 40 Mich. 517, 523.

[c] 12 Bush 249.

[d] *Acc.* Greer *v.* Tweed, 13 Abb. N. S. 427; Colwell *v.* Foulks, 36 How. Pr. 306.

excessive," [a] some that they must not be "unjust and oppressive," [b] "unreasonable," [c] "extravagant," [d] or "disproportionate"; [e] but all seem to agree upon the principle that the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach.[f] Thus where a contract of hiring provided that, on the servant leaving without notice, whatever was then due to him should be considered as liquidated damages for the breach of his contract, it was held that the forfeiture would not be enforced by the courts. Since the arrears of wages might be large or small, the principle of compensation was clearly departed from by the parties; [g] but the forfeiture of a fixed reasonable sum would be allowed.[h]

A transaction was once common in certain parts of the country, whereby a debtor in embarrassed circumstances obtained an extension of time from his creditors by means of an agreement by them not to sue on their demands for a certain length of time, it being provided in the agreement that if suit were brought within the time limited, the debt should be wholly discharged.

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[a] Parr *v.* Greenbush, 42 Hun 232.

[b] Scofield *v.* Tompkins, 95 Ill. 190; Mueller *v.* Kleine, 27 Ill. App. 473; Higginson *v.* Weld, 14 Gray 165.

[c] Hardee *v.* Howard, 33 Ga. 533; Sutton *v.* Howard, 33 Ga. 536; Maxwell *v.* Allen, 78 Me. 32; Daly *v.* Maitland, 88 Pa. 384; Williams *v.* Vance, 9 S. C. 344; Schrimpf *v.* Tenn. Manuf. Co., 86 Tenn. 219.

[d] Gammon *v.* Howe, 14 Me. 250.

[e] Jaqua *v.* Headington, 114 Ind. 309; Hamaker *v.* Schroers, 49 Mo. 406; Staples *v.* Parker, 41 Barb. 648.

[f] Cases cited above, also Tholen *v.* Duffy, 7 Kas. 405; Stearns *v.* Barrett, 1 Pick. 443; Gower *v.* Saltmarsh, 11 Mo. 271; Dennis *v.* Cummins, 3 Johns. Cas. 297; Burrage *v.* Crump, 3 Jones L. 330; Pennypacker *v.* Jones 106 Pa. 237; Jones *v.* Queen, 7 Can. 570.

[g] Richardson *v.* Woehler, 26 Mich. 90; Schrimpf *v.* Tenn. Manuf. Co., 86 Tenn. 219; *acc.* Jones *v.* Queen, 7 Can. 570.

[h] Richardson *v.* Woehler, 26 Mich. 90.

This provision was enforced by the Supreme Court of Massachusetts.[a] It will be seen that breach of the agreement by one creditor might defeat the whole transaction, and therefore that the stipulation was not at all unreasonable.

§ 408. Language not conclusive—Rule in case of doubt. —It follows from what has been said that the language of the contract is not conclusive. The question whether a stipulated sum is to be allowed as liquidated damages is a question of law,[b] and no agreement of the parties to call it a penalty or liquidated damages can decide the question. It is expressly said in a well-considered case decided by the Supreme Court of Michigan, that even if it were admitted as a fact that the parties intended the sum to be considered as liquidated damages and not as a penalty, the admission could have no influence upon the decision of a court of law.[c] The mere use of the word "penalty," "penal," or "forfeit" on one side, or "stipulated damages" on the other, will therefore not decide the question.[d] The only inquiry as to intention is whether or not the parties intended the sum to be accepted *as compensation.* That is a question involving the interpretation of the contract, and of course no evidence on the question can be received *dehors* the instrument. The case of Bigony *v.* Tyson[e] is in conflict with the views ex-

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[a] White *v.* Dingley, 4 Mass. 433.

[b] Sainter *v.* Ferguson, 7 C. B. 716; Reindel *v.* Schell, 4 C. B. (N. S.) 97.

[c] Jaquith *v.* Hudson, 5 Mich. 123, 136.

[d] Parfitt *v.* Chambre, L. R. 15 Eq. 36; Fletcher *v.* Dyche, 2 T. R. 32; Sainter *v.* Ferguson, 7 C. B. 716; Jones *v.* Green, 3 Y. & J. 298; Bignall *v.* Gould, 119 U. S. 495; Scofield *v.* Tompkins, 95 Ill. 190; Duffy *v.* Shockey, 11 Ind. 70; Beard *v.* Delaney, 35 Ia. 16; Pierce *v.* Fuller, 8 Mass. 223; Jaquith *v.* Hudson, 5 Mich. 123; Nobles *v.* Bates, 7 Cow. 307; Eakin *v.* Scott, 70 Tex. 442; Yenner *v.* Hammond, 36 Wis. 277; Henderson *v.* Nichols, 5 Up. Can. Q. B. 398; Chatterton *v.* Crothers, 9 Ont. 683.

[e] 75 Pa. 157.

pressed here. There the agreement was in the form of a common bond, binding Bigony not to practice medicine within a certain district. The court below charged the jury that the sum named in the bond was liquidated damages. This the court above decided to be error, but sent the case down for a new trial, on the ground that while there was nothing in the instrument itself which would enable the court to construe it as anything but a bond, the plaintiff was entitled to have the jury pass upon the intention of the parties outside the contract. The court even speaks of the "well established" rule that "the intention of the parties, gathered *extra* the written instrument, may control the technical rule as found upon the face of that instrument, and thus fix the sum therein mentioned as stipulated damages"; and adds, "it is obvious, then, that this dispute, involving, as it does, the character of the obligation in controversy, can be settled only by a jury." The court refers, however, to no authorities, and the decision cannot be supported on principle. In interpreting the contract, the court when in doubt will presume the parties not to have meant the stipulated sum to be compensation, or in other words, will treat the sum fixed by the parties as a penalty.(a)

§ 409. **Rules of interpretation.**—Having now stated the general rules applicable to all contracts, we proceed to examine the particular canons applicable in certain well-defined classes of cases. These, however, are derived from and are themselves no more than particular applications of the general rules. It should be observed, also, that they are really artificial canons of interpretation, applied

(a) Davies *v.* Penton, 6 B. & C. 216; Crisdee *v.* Bolton, 3 C. & P. 240; People *v.* C. P. R.R. Co., 76 Cal. 29; Bearden *v.* Smith, 11 Rich. L. 554; Baird *v.* Tolliver, 6 Humph. 186; Moore *v.* Anderson, 30 Tex. 224; Smith *v.* Wainwright, 24 Vt. 97, 103; Henderson *v.* Nichols, 5 Up. Can. Q. B. B. 398.

by the court to the construction of the contract, and are not formulated as positive rules of law for the guidance of the jury. They only express the experience of judges in applying a variety of tests to the contract in order to determine whether it conforms to a certain legal standard, or whether, falling short of this standard, it must be set aside.

§ 410. **Penal sum collateral to object of contract.**—*Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages.* In a contract for the sale of land for $8,000, payable, $5,000 on the 1st of January following, and the rest in three annual instalments, a clause stating that "in further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of $1,000," is not to be considered as liquidated damages for the breach of this agreement, but as a penalty superadded.(a)

The plaintiff drew up and delivered to the defendant a written lease of land of the plaintiff, and the defendant agreed to return the lease in ninety days or pay $3,000 on failure to do so. It was held that this sum was wholly collateral to the loan of the written instrument, and was not liquidated damages.(b) The defendant agreed to allow the plaintiff to use a certain building while it stood, and gave him a note payable on breach of the agreement. This note was held not to be enforceable, since it was in the nature of a penalty.(c) A penal bond comes ordinarily under this rule. In some exceptional cases the penalty in a bond, as will be seen, is regarded

(a) Robinson *v.* Cathcart, 2 Cranch C. C. 590; *acc.* Richards *v.* Edick, 17 Barb. 260; Law *v.* House, 3 Hill (S. C.) 268.

(b) Burrage *v.* Crump, 3 Jones L. 330.

(c) Merrill *v.* Merrill, 15 Mass. 488.

as liquidated damages; but in general it is regarded as a penalty. So of a bond to submit to arbitration,[a] or to convey land.[b] The rule is the same if such an arrangement is in the form of an ordinary contract. If an agreement to submit to arbitration is secured by a promise to pay a collateral sum of money on breach of the agreement, that sum is held to be a penalty, and payment of it is not enforced by the court.[c] And though the use of the words "penalty," "forfeiture," "liquidated damages" is not conclusive, it will be considered by the court as indicating the intention of the parties as to whether the sum named was or was not regarded by them as compensatory.[d] In fact, there has been a disposition to regard the word "penalty" as conclusive; and though this is not an absolute rule, yet great reluctance is shown in construing as liquidated damages a sum expressly called a penalty by the parties.

§ 411. **Stipulated sum for non-payment of smaller sum.**— *Whenever an amount stipulated is to be paid on the non-payment of a less amount or on default in delivering a thing of less value, the sum will generally be treated as a penalty.*[e] Thus where the defendant, as surety, bound

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[a] Henry *v.* Davis, 123 Mass. 345.

[b] Brown *v.* Bellows, 4 Pick. 179; Robeson *v.* Whitesides, 16 S. & R. 320; Burr *v.* Todd, 41 Pa. 206.

[c] Spear *v.* Smith, 1 Den. 464; Henderson *v.* Cansler, 65 N. C. 542.

[d] Reilly *v.* Jones, 1 Bing. 302; Van Buren *v.* Digges, 11 How. 461; Bignall *v.* Gould, 119 U. S. 495; Dyer *v.* Dorsey, 1 G. & J. 440; Stearns *v.* Barrett, 1 Pick. 443; Salters *v.* Ralph, 15 Abb. Pr. 273; Colwell *v.* Foulks, 36 How. Pr. 306; Williams *v.* Vance, 9 S. C. 344; Smith *v.* Wainwright, 24 Vt. 97.

[e] White *v.* Arleth, 1 Bond 319; Haldeman *v.* Jennings, 14 Ark. 329; Tiernan *v.* Hinman, 16 Ill. 400; Peine *v.* Weber, 47 Ill. 41; Kuhn *v.* Myers, 37 Ia. 351; Hahn *v.* Horstman, 12 Bush 249; Kellogg *v.* Curtis, 9 Pick. 534; Fisk *v.* Gray, 11 All. 132; Morse *v.* Rathburn, 42 Mo. 594; Morris *v.* McCoy, 7 Nev. 399; Lindsay *v.* Anesley, 6 Ired. 186; Thoroughgood *v.* Walker, 2 Jones L. 15; Smith *v.* Wainwright, 24 Vt. 97; Rutherford *v.*

himself in the sum of $240, for the performance by his principal of a contract to deliver two boat-loads of coal, the sum to be recoverable on failure to deliver either, the sum was not allowed as liquidated damages.([a]) But the larger sum may appear to be a fair compensation for the breach. Thus where the larger sum is a debt actually due, but the debtor may discharge the debt by the payment before a certain time of a less sum, the payment of the larger sum may be enforced after that date.([b]) So a note for a sum certain at a future day, which may be discharged by the payment of a lesser sum on any earlier day, is valid, and the larger sum is not a penalty.([c]) Damages for such delay will often be an equivalent for interest. So a stipulation that in case of non-payment of a note at maturity a certain additional sum should be paid as liquidated damages for delay was held reasonable, and the amount was allowed as liquidated damages.([d]) On the same principle, a provision in a note that it shall bear interest at a certain rate from its date if the principal is

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Stovel, 12 Up. Can. C. P. 9. In Gowen *v.* Gerrish, 15 Me. 273, defendant entered in a bond with plaintiff for $7,000, conditioned that he should not become surety for any other person than plaintiff, until he should have paid him a debt of $6,000, for which a long credit had been given. The credit had been given upon a contract for the purchase of real estate, and the sum secured by the bond exceeded by one-sixth the price agreed. The court said that this must have been intended to *secure* the accruing interest, and held the measure of damages on breach to be the original price, with interest. This case is cited in an article contributed to the *American Law Review* by the late Mr. John Proffatt of the California Bar (12 Am. L. R. 286), as one in which the damages were held to have been liquidated, but we do not so understand the language of the court.

([a]) Curry *v.* Larer, 7 Pa. 470.

([b]) Thompson *v.* Hudson, L. R. 4 H. L. 1.

([c]) Jordan *v.* Lewis, 2 Stew. 426; Carter *v.* Corley, 23 Ala. 612; Waggoner *v.* Cox, 40 Oh. St. 539; Campbell *v.* Shields, 6 Leigh 517. But *contra*, Moore *v.* Hylton, 1 Dev. Eq. 429.

([d]) Sutton *v.* Howard, 33 Ga. 536; Yetter *v.* Hudson, 57 Tex. 604. But *contra*, Taul *v.* Everet, 4 J. J. Marsh 10; Brockway *v.* Clark, 6 Oh. 46.

not paid at maturity is valid, and the arrears of interest is liquidated damages for non-payment of the money.(a)

§ 412. **Stipulated sum not proportioned to injury.**—*Whenever the stipulated sum is to be paid on breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages.* In a contract providing for payment in instalments it is often provided that a certain proportion of the contract price shall be retained at each payment; and upon breach of the contract the whole sum so retained shall be forfeited. It is held in some States, and this seems to be the correct view, that this sum bears no proportion to the actual damage, since the earlier (and presumably the more injurious) the breach, the less the stipulated damages are; and in these States the amount is therefore not allowed as liquidated damages.(b) In other States, however, the amount, if not excessive, is allowed.(c)

§ 413. **One sum stipulated for breach of contract securing several things.**—*A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty.*(d) The rule is not always fully stated in the

(a) Reeves *v.* Stipp, 91 Ill. 609; Wilson *v.* Dean, 10 Ia. 432; Rogers *v.* Sample, 33 Miss. 310. But *contra*, Waller *v.* Long, 6 Munf. 71.

(b) Savannah & C. R.R. Co. *v.* Callahan, 56 Ga. 331; Jemmison *v.* Gray, 29 Ia. 537; Potter *v.* McPherson, 61 Mo. 240; Dullaghan *v.* Fitch, 42 Wis. 679, explaining and affirming Jackson *v.* Cleveland, 19 Wis. 400.

(c) Elizabethtown & P. R.R. Co. *v.* Geoghegan, 9 Bush. 56; Geiger *v.* W. M. R.R. Co., 41 Md. 4; Easton *v.* P. & O. Canal Co., 13 Oh. 79.

(d) *Ex parte* Capper, 4 Ch. D. 724; Davies *v.* Penton, 6 B. & C. 216; Edwards *v.* Williams, 5 Taunt. 247; Kemble *v.* Farren, 6 Bing. 141; Boys *v.* Ancell, 5 Bing. N. C. 390; Magee *v.* Lavell, L. R. 9 C. P. 107; Beckham *v* Drake, 8 M. & W. 846; Horner *v.* Flintoff, 9 M. & W 678; Betts *v.*

cases; the court usually states only that part of the rule which is forcibly brought out by the facts under consideration. Thus it is sometimes laid down in a more specific form, that where the agreement binds the parties to the performance of several matters of different degrees of importance, and one of the stipulations contemplates the payment of a sum of money less than the sum fixed as security, the latter is to be regarded as a penalty;[a] sometimes that where the agreement binds the parties to the performance of several matters of different degrees of importance, in a sum made payable for the non-performance of any or either of them, it must be regarded as a penalty.[b] But it is very difficult to see how a mere difference of degree in the importance of the stipulations can of itself affect the question, provided the damages are uncertain or difficult of computation, unless indeed the difference creates that glaring sort of a dispropor-

Burch, 4 H. & N. 506; Watts *v.* Camors, 115 U. S. 353; Nash *v.* Hermosilla, 9 Cal. 584; People *v.* C. P. R.R. Co., 76 Cal. 29; Trower *v.* Elder, 77 Ill. 452; Carpenter *v.* Lockhart, 1 Ind. 434; Foley *v.* McKeegan, 4 Ia. 1; Lord v. Gaddis, 9 Ia. 265; Hallock *v.* Slater, 9 Ia. 599; Heatwole *v.* Gorrell, 35 Kas. 692; Heard *v.* Bowers, 23 Pick. 455; Higginson *v.* Weld, 14 Gray 165; Daily *v.* Litchfield, 10 Mich. 29; First Orthodox Cong. Church *v.* Walrath, 27 Mich. 232; Carter *v.* Strom, 41 Minn. 522; Bright *v.* Rowland, 3 How. (Miss.) 398; Moore *v.* Platte County, 8 Mo. 467; Basye *v.* Ambrose, 28 Mo. 39; Hammer v. Breidenbach, 31 Mo. 49; Long *v.* Towl, 42 Mo. 545; Morris *v.* McCoy, 7 Nev. 399; Whitfield *v.* Levy, 35 N. J. L. 149; State *v.* Dodd, 45 N. J. L. 525; Jackson *v.* Baker, 2 Edw. Ch, 471; Niver *v.* Rossman, 18 Barb. 50; Staples *v.* Parker, 41 Barb. 648; Beale *v.* Hayes, 5 Sandf. 640; Thoroughgood *v.* Walker, 2 Jones L. 15; Berry *v.* Wisdom, 3 Oh. St. 241; Shreve *v.* Brereton, 51 Pa. 175; March *v.* Allabough, 103 Pa. 335; Lyman *v.* Babcock, 40 Wis. 503; McLean *v.* Tinsley, 7 Up. Can. Q. B. 40; Brown *v.* Taggart, 10 Up. Can. Q. B. 183; Rutherford *v.* Stovel, 12 Up. Can. C. P. 9.

[a] Cotheal *v.* Talmage, 9 N. Y. 551; Lampman *v.* Cochran, 16 N. Y. 275; Clement *v.* Cash, 21 N. Y. 253. A substantially identical interpretation was arrived at in Brewster *v.* Edgerly, 13 N. H. 275, where, however, the court refused to accede to the rule.

[b] Hahn *v.* Horstman, 12 Bush 249.

tion between the injury likely to arise from a breach and the stipulated remedy, which enables the court to say at once that the parties could not have intended such a result, or that it would be unjust to allow this expressed intention of the parties to govern. The rule in its general form is that stated above.

The rule in its varying forms appears to be based upon the principle already stated, that when the court can see that the fundamental guide of compensation has been abandoned by the parties, and an arbitrary and unjust measure applied, they will not allow the intention of the parties to take effect. That this must frequently be the case in contracts covering a variety of stipulations differing from others in importance, provided the stipulations, or some of them, are such that the actual damages can be readily calculated, is obvious. Where a contract consists of several important stipulations, and damages cannot be adequately assessed for a breach of any of the stipulations, the court (except, no doubt, in case of great disproportion between the stipulated sum and the actual loss) will enforce the payment of the stipulated sum as liquidated damages.[a]

§ 414. **Deposit to be forfeited on default.**—*Where the instrument refers to a sum deposited as security for performance, the forfeiture, if reasonable in amount, will be enforced as liquidated damages.*[b] The intention is evident here that the money shall actually be paid over upon breach of the contract. In a recent case in New

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[a] Wallis *v.* Smith, 21 Ch. Div. 243; Mercer *v.* Irving, E. B. & E. 563.

[b] Wallis *v.* Smith, 21 Ch. Div. 243; Reilly *v.* Jones, 1 Bing. 302; Hinton *v.* Sparkes, L. R. 3 C. P. 161; Lea *v.* Whitaker, L. R. 8 C. P. 70; Swift *v.* Powell, 44 Ga. 123; Perzell *v.* Shook, 53 N. Y. Super. Ct. 501; Mathews *v.* Sharp, 99 Pa. 560; Eakin *v.* Scott, 70 Tex. 442. This principle is the true explanation of Stillwell *v.* Temple, 28 Mo. 156.

York,[a] however, this rule was held to apply only where the deposit was made in part performance of the contract, not where it was a mere security. In that case $1,500 were deposited by a lessee to secure payment of the rent of $500 a month. Upon default in the payment of one month's rent it was held that the whole deposit would not be forfeited. It will be noticed, however, that the decision itself is not in conflict with the rule as above stated, since the deposit was greatly in excess of the actual damage; and this fact was noticed by the court.

§ 415. **Contracts performed in part.**—*If the contract is one in which the measure of damages for part performance is ascertainable and a sum is stipulated for breach of it, this sum will not be allowed as liquidated damages in case of a partial breach;* for what would be reasonable compensation in case of a total breach would not be such in case of a partial breach.[b] If it appears affirmatively from the language of the contract that the sum was meant to be payable only in case of total breach, the stipulated sum will not be considered at all in an action for a partial breach.[c] In Louisiana, by statute, if the obligation is partly executed the judge may modify the penalty.[d]

The contract may be of such a nature that the performance, though it consists of various acts or a series of

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[a] Chaude *v.* Shepard, 122 N. Y. 397.

[b] Charrington *v.* Laing, 6 Bing. 242; *Ex parte* Pollard, 2 Low. 411; Watts *v.* Sheppard, 2 Ala. 425; Keeble *v.* Keeble, 85 Ala. 552 (*semble*); Heatwole *v.* Gorrell, 35 Kas. 692; Shute *v.* Taylor, 5 Met. 61; Gower *v.* Saltmarsh, 11 Mo. 271; Hamaker *v.* Schroers, 49 Mo. 406; Wibaux *v.* Grinnell L. S. Co., 9 Mont. 154; Lampman *v.* Cochran, 16 N. Y. 275; Colwell *v.* Lawrence, 38 Barb. 643; Wheatland *v.* Taylor, 29 Hun 70; Owens *v.* Hodges, 1 McM. 106; Fitzpatrick *v.* Cottingham, 14 Wis. 219; Sleeman *v.* Waterous, 23 Up. Can. C. P. 195.

[c] Cook *v.* Finch, 19 Minn. 407.

[d] Code, § 2127.

acts, is yet one complex affair, and a failure to perform any part is really a total breach, defeating the entire object of the contract. In such a case the stipulated sum, if not unreasonable, may be recovered, although there has been a breach of only one stipulation. Thus the object of a contract by the defendant to refrain from intoxicating liquors during a term of service in the plaintiff's employ is entirely lost by a single breach, and the stipulated sum may be recovered.[a] The same decision has been reached in the case of a contract to marry and support a woman and give her no cause of divorce,[b] and of a contract between manufacturers of a certain article to employ no union men, use no union label, or buy and sell no article marked with a union label.[c]

§ 416. Stipulated sum in liquidation of uncertain damage. —*Where, independently of the stipulation, the damages would be wholly uncertain, and incapable or very difficult of being ascertained, except by mere conjecture, there the damages will be usually considered liquidated.*[d]

(a) Keeble *v.* Keeble, 85 Ala. 552.

(b) Stanley *v.* Montgomery, 102 Ind. 102.

(c) Schrader *v.* Lillis, 10 Ont. 358.

(d) Reynolds *v.* Bridge, 6 E. & B. 528; Hurst *v.* Hurst, 4 Ex. 571; Harris *v.* Miller, 6 Sawy. 319; Keeble *v.* Keeble, 85 Ala. 552; Williams *v.* Green, 14 Ark. 315; Cal. Steam Nav. Co. *v.* Wright, 6 Cal. 258; Fisk *v.* Fowler, 10 Cal. 512; People *v.* Love, 19 Cal. 676; Tingley *v.* Cutler, 7 Conn. 291; Goldsborough *v.* Baker, 3 Cranch C. C. 48; Newman *v.* Wolfson, 66 Ga. 764; Hamilton *v.* Overton, 6 Blackf. 206; Studabaker *v.* White, 31 Ind. 211; Wolf *v.* D. M. & F. D. Ry. Co., 64 Ia. 380; Dwinel *v.* Brown, 54 Me. 468; Leary *v.* Laflin, 101 Mass. 334; Williams *v.* Dakin, 22 Wend. 201; Holmes *v.* Holmes, 12 Barb. 137; Esmond *v.* Van Benschoten, 12 Barb. 366; Mundy *v.* Culver, 18 Barb. 336; De Groff *v.* Amer. Linen Thread Co., 24 Barb. 375; Brinkerhoff *v.* Olp, 35 Barb. 27; Parr *v.* Greenbush, 42 Hun 232; Bingham *v.* Richardson, 1 Winston (N. C.) 217; Lange *v.* Werk, 2 Oh. St. 519; Powell *v.* Burroughs, 54 Pa. 329; Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Pa. 180; Williams *v.* Vance, 9 S. C. 344; Indianola *v.* G. W. T. & P. Ry. Co., 56 Tex. 594; Pierce *v.* Jung, 10 Wis. 30; Ryan *v.* Martin, 16 Wis. 57; Ivinson *v.* Althrop, 1 Wyo. 71; Craig *v.* Dillon, 6 Ont. App. 116.

The uncertainty contemplated by the rule is an uncertainty as to the extent and amount, and not as to the proper measure of damages. If the views expressed above, however, are correct, the mere fact that the precise amount of damages cannot be anticipated will not be enough. It must also be clear that there will not be a glaring disproportion between the sum stipulated and the probable legal measure. The meaning and scope of the rule can best be learned by an examination of the cases.

The plaintiff and other landowners subscribed towards building a hotel by the defendant near their land; the defendant agreed, in case he failed to build the hotel, to pay $20,000 to the subscribers. This sum was allowed as liquidated damages.[a] The plaintiff and defendant, manufacturers of cigars, in order to oppose the demands of their workmen, mutually agreed to employ no union workman, use no union label, and buy or sell no cigar marked with a union label. On any breach $500 were to be paid. This was allowed as liquidated damages.[b] In an agreement to extend streets through land sold by the defendants to the plaintiff the sum of $250 was named as liquidated damages in case of default. It was held that that amount might be recovered.[c] Where the plaintiff licensed the defendant to use his patent, with an agreement that the plaintiff might at any time inspect the work done under the license "under a penalty of $1,000 fixed as liquidated damages," it was held that the amount might be recovered.[d]

The contract of a railway company with its conductors

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[a] Chase *v.* Allen, 13 Gray 42.
[b] Schrader *v.* Lillis, 10 Ont. 358.
[c] Jaqua *v.* Headington, 114 Ind. 309.
[d] Wooster *v.* Kisch, 26 Hun 61.

provided that any conductor who took a fare directly from a passenger should be liable to a fine of $15. This was held to be a reasonable stipulation, and the fine was allowed as liquidated damages.(a) Where an assignor of a mortgage agreed with his assignee, that a decree foreclosing a prior mortgage on the same and other premises, should provide that the others be first sold, and their proceeds applied to the prior mortgage, stipulating in the agreement that if it were not performed, he should pay the assignee a specific sum (equal to the amount of the assigned mortgage), this stipulation, on account of the uncertainty of the damages, was held, by the New York Court of Appeals, to liquidate them, and not to be a penalty.(b)

In McIntire *v.* Cagley (c) the parties had stipulated for ten per cent. of the amount of a note as attorney's fees, if the note were collected by suit. It was held that the amount was to be considered as liquidated damages, on the ground of the impossibility of ascertaining with certainty beforehand the pecuniary measure of the injury. But where a mortgage note for a large amount stipulated that in case legal proceedings were necessary the mortgagee should be entitled to five per cent. of the note as an attorney's fee, the stipulated sum was held excessive.(d) In Michigan a lump sum as an attorney's fee was held a penalty;(e) but in Wisconsin, where it was reasonable in amount, it was allowed as liquidated damages.(f) Upon breach of a covenant to discharge an incumbrance the amount stipulated may be recovered as

(a) Birdsall *v.* Twenty-third St. Ry. Co., 8 Daly 419.
(b) Cowdrey *v.* Carpenter, 1 Abb. App. 445.
(c) 37 Ia. 676; *acc.* Tholen *v.* Duffy, 7 Kas. 405.
(d) Daly *v.* Maitland, 88 Pa. 384, overruling earlier cases.
(e) Myer *v.* Hart, 40 Mich. 517.
(f) Tallman *v.* Truesdale, 3 Wis. 443.

liquidated damages.[a] In Berrinkott *v.* Traphagen [b] a bond had been given in the penal sum of $900, conditioned to pay to plaintiff the interest on $464 every year, and in case of default, that the principal should become due. *Held*, (Ryan, C. J., *diss.*) that the real value of the annuity could not be determined by reference to tables of mortality; that the damages were therefore uncertain, and that the sum named must be regarded as liquidated damages. On an agreement by the defendant to buy all his meat of the plaintiff, a stipulated sum was allowed as liquidated damages for the breach.[c]

§ 417. **Breach of contract of sale.**—*Upon breach of a contract for the sale of property of uncertain value the stipulated sum is allowed as liquidated damages.*[d] In Gobble *v.* Linder,[e] plaintiff and defendant had agreed to exchange farms. The contract contained a provision that either party failing to make the deed in exchange, should "forfeit and pay as damages" the sum of $1,500. Defendant failed to perform. By stipulation in the case, plaintiff argued that the actual damages did not exceed $50. The sum was decided to be liquidated damages.

In New York it is held that in ordinary contracts for the sale of land the amount of loss is easily ascertained, and that therefore the stipulated sum will not be allowed as liquidated damages unless there is some other ground for so considering it. This is held both in cases of ex-

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[a] Fasler *v.* Beard, 39 Minn. 32.

[b] 39 Wis. 219; *acc.* Waggoner *v.* Cox, 40 Oh. St. 539. But where the interest on the stipulated sum was greater than the annuity, it was held a penalty. Cairnes *v.* Knight, 17 Oh. St. 68.

[c] Lightner *v.* Menzel, 35 Cal. 452.

[d] Gammon *v.* Howe, 14 Me. 250; Chamberlain *v.* Bagley, 11 N. H. 234; Mead *v.* Wheeler, 13 N. H. 351; Main *v.* King, 10 Barb. 59; Streeper *v.* Williams, 48 Pa. 450; Durst *v.* Swift, 11 Tex. 273; Yenner *v.* Hammond, 36 Wis. 277.

[e] 76 Ill. 157.

change ([a]) and of sale ([b]) of land. If the parties clearly intended the sum to be paid as compensation, it will be allowed as liquidated damages if it is reasonable in amount,([c]) but not otherwise.([d]) In Kentucky an agreement that in case of eviction from the granted premises the grantor should refund the consideration with interest was held to make that sum liquidated damages.([e]) The same general rule applies in case of a contract for the sale of an interest in a partnership,([f]) or of personal property of uncertain price.([g])

§ 418. **Of agreement not to carry on business.**—*Where a party binds himself in a sum named not to carry on any particular trade, business, or profession, within certain limits, or within a specified period of time, the sum mentioned will be regarded as liquidated damages and not a penalty.*([h]) It is sometimes said that agreements of this sort are alternative in character; but in

([a]) Noyes *v.* Phillips, 60 N. Y. 408.

([b]) Richards *v.* Edick, 17 Barb. 260; Laurea *v.* Bernauer, 33 Hun 307.

([c]) Slosson *v.* Beadle, 7 Johns. 72; Hasbrouck *v.* Tappen, 15 Johns. 200; Knapp *v.* Maltby, 13 Wend. 587.

([d]) Dennis *v.* Cummins, 3 Johns. Cas. 297.

([e]) Bradshaw *v.* Craycraft, 3 J. J. Marsh 77.

([f]) Maxwell *v.* Allen, 78 Me. 32; Lynde *v.* Thompson, 2 All. 456.

([g]) Knowlton *v.* Mackay, 29 Up. Can. C. P. 601.

([h]) National Provincial Bank of England *v.* Marshall, 40 Ch. Div. 112; Reynolds *v.* Bridge, 6 E. & B. 528; Sainter *v.* Ferguson, 7 C. B. 716; Leighton *v.* Wales, 3 M. & W. 545; Crisdee *v.* Bolton, 3 C. & P. 240; Cal. Steam Nav. Co. *v.* Wright, 6 Cal. 258; Streeter *v.* Rush, 25 Cal. 67; Newman *v.* Wolfson, 69 Ga. 764; Duffy *v.* Shockey, 11 Ind. 70; Spicer *v.* Hoop, 51 Ind. 365; Johnson *v.* Gwinn, 100 Ind. 466; Applegate *v.* Jacoby, 9 Dana 206; Holbrook *v.* Tobey, 66 Me. 410; Pierce *v.* Fuller, 8 Mass. 223; Cushing *v.* Drew, 97 Mass. 445; Jaquith *v.* Hudson, 5 Mich. 123; Cheddick *v.* Marsh, 21 N. J. L. 463; Hoagland *v.* Segur, 38 N. J. L. 230; Nobles *v.* Bates, 7 Cow. 307; Smith *v.* Smith, 4 Wend. 468; Dakin *v.* Williams, 17 Wend. 447; 22 Wend. 201; Dunlop *v.* Gregory, 10 N. Y. 241; Mott *v.* Mott, 11 Barb. 127; Lange *v.* Werk, 2 Oh. St. 519; Grasselli *v.* Lowden, 11 Oh. St. 349; Muse *v.* Swayne, 2 Lea 251; Barry *v.* Harris, 49 Vt. 392. *Contra*, Perkins *v.* Lyman, 11 Mass. 76; Smith *v.* Wainwright, 24 Vt. 97, overruled.

Stewart *v.* Bedell(a) the Supreme Court of Pennsylvania decided that this is not the case. In Sparrow *v.* Paris (b) the defendant had guaranteed the plaintiff, a shipper, that no more than one ship should sail for Havana before that containing his goods, under penalty of forfeiting one-half the freight of the goods. Although the word "penalty" was used, this was held to be liquidated damages, on the ground that the sum was to be paid on *one* event, and was not a security for the performance of several matters. An attempt was made in this case to argue that several events were secured, viz., that the ship should not be the second, nor third, nor fourth, etc. But the court (Bramwell, B.) said: "If this argument availed, it would equally have availed in those cases where liquidated damages have been held recoverable for carrying on trade within limited distances."

Where the defendant on retiring from business had covenanted that he would not reside within the distance of two and a half miles from his then residence, and that if he did, he would pay £1,000, as liquidated damages, and not as penalty; and he fixed his new residence a few feet within the distance, it was held that the whole sum was recoverable; Parke, B., saying that Kemble *v.* Farren was "somewhat stretched," and that "if a party agrees to pay £1,000 on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages and not a penalty."[1]

[1] Atkyns *v.* Kinnier, 4 Ex. 776; *acc.* Galsworthy *v.* Strutt, 1 Ex. 659.

(a) 79 Pa. 336.

(b) 7 H. & N. 594.

So, again, where the defendant had contracted not to practice as a performer within a certain district, he bound himself to the plaintiff in the sum of £5,000, "as and by way of liquidated damages, and not of penalty"; the authority of Kemble *v.* Farren was invoked for the defendant; but the court said:

"Where the deed contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others, they might be deemed unliquidated, and a sum of money is made payable upon a breach of any of them, the courts have held it to be a penalty only, and not liquidated damages. But where the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it by way of liquidated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty."[1]

Where suit is brought on an agreement made between two coach proprietors, that, in consideration of a certain sum of money, the defendant would withdraw his stage-coach, and not concern himself in driving any other coach on that road, and the agreement contained a clause that for its due and punctual performance, each of the parties bound himself to the other "in the sum of £500, to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other, who shall neglect or refuse to perform his part of the agreement"; it was held not a penalty, but liquidated damages, from which the court would not depart.[2] And the same point was decided in a very analogous case at an early day,[3] by the Supreme Court of Massachusetts, where the opinion was delivered by Mr. Justice Sedgwick.

So, where one having sued the owner of a laboratory

[1] Green *v.* Price, 13 M. & W. 695; Price *v.* Green, 16 M. & W. 346.

[2] Barton *v.* Glover, 1 Holt, N. P. 43.

[3] Pierce *v.* Fuller, 8 Mass. 223.

in the neighborhood for damages to his real estate from the operations of the laboratory, the parties, pending the suit, entered into an agreement by which the plaintiff discontinued it, and the defendant agreed to stop the laboratory business within five years, or pay $3,000 as liquidated damages, and the defendant did not close the business within the time, the court held that the $3,000 were liquidated damages, refusing to consider the fact alleged by the defendant that the mode of conducting the business had been so changed that it was thereby rendered entirely harmless and unobjectionable, as affecting the question.([a]) But where the parties mutually bound themselves in the sum of $300, one to pay $150 for a certain business, and the other to refrain from competition, it was held, in an action by the purchaser, that the sum stipulated would be regarded as a penalty.([b]) The court was influenced by the fact that the sum secured the plaintiff's payment of a less sum of money; and there is no doubt that as to him the amount is a penalty. But there seems to be no reason why a stipulated sum, though a penalty, so far as regards one of the parties, should not be regarded as liquidated damages when the other party is defendant.

§ 419. **For delay in completing performance.**—*Parties may usually liquidate damages for delay in the performance of a contract.* This is one of the commonest instances of stipulated damages. When it is provided in a building contract that the work shall be completed on a certain day, and that the builder shall "forfeit" or "allow" a stipulated sum for every day or week the completion of the work is delayed beyond that time, the stipulated sum, if a reasonable one, may be recovered as liquidated dam-

([a]) Grasselli *v.* Lowden, 11 Oh. St. 349.
([b]) Moore v. Colt, 127 Pa. 289.

ages for the delay.(a) But if the work, instead of being delayed, is abandoned in an unfinished state by the defendant, it is evident that the stipulated sum cannot be recovered for an indefinite time; (b) it would be grossly oppressive to make the plaintiff "a pensioner upon the defendant *ad infinitum*." Whether the courts would allow the plaintiff a reasonable time to complete the work himself, or whether they would refuse altogether to enforce the stipulation, has not been decided. In the former case we should have another illustration of the application of the rule of avoidable consequences, elsewhere discussed, and a consequence of this would be that the party injured would be allowed the stipulated damages for a reasonable period, after which, his duty to cause the contract to be performed himself would interrupt further recovery of them. A large sum agreed to be paid at once if performance is delayed beyond a certain date is not allowed as liquidated damages.(c) And if the stipulated damages for delay, though proportioned to the time of delay, are greatly out

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(a) Fletcher *v.* Dyche, 2 T. R. 32; Legge *v.* Harlock, 12 Q. B. 1015; Crux *v.* Aldred, 14 W. R. 656; Mueller *v.* Kleine, 27 Ill. App. 473; Curtis *v.* Brewer, 17 Pick. 513; Folsom *v.* McDonough, 6 Cush. 208; Hall *v.* Crowley, 5 All. 304; Bridges *v.* Hyatt, 2 Abb. Pr. 449; O'Donnell *v.* Rosenberg, 14 Abb. N. S. 59; Farnham *v.* Ross, 2 Hall 167; Weeks *v.* Little, 47 N. Y; Super. Ct. 1; Worrell *v.* McClinaghan, 5 Strobh. 115; Welch *v.* McDonald, 85 Va. 500; Jones *v.* Queen, 7 Can. 570; Gilmour *v.* Hall, 10 Up. Can. Q. B. 309; McPhee *v.* Wilson, 25 Up. Can. Q. B. 169; Scott *v.* Dent, 38 Up. Can. Q. B. 30; Gaskin *v.* Wales, 9 Up. Can. C. P. 314; Chatterton *v.* Crothers, 9 Ont. 683; Horton *v.* Tobin, 20 N. S. 169; Lefurgy *v.* McGregor, 1 Pr. Ed. Isl. 72. *Contra*, Wilcus *v.* Kling, 87 Ill. 107, where no actual damage was shown; Patent Brick Co. *v.* Moore, 75 Cal. 205, according to the Code, § 1671, which allows liquidated damages only when it would be impracticable or extremely difficult to fix the actual damage; Brennan *v.* Clark, 45 N. W. Rep. 472 (Neb.).

(b) Hahn *v.* Horstman, 12 Bush 249; Greer *v.* Tweed, 13 Abb. N. S. 427 Colwell *v.* Foulks, 36 How. Pr. 306.

(c) Tayloe *v.* Sandiford, 7 Wheat. 13; S. & C. R.R. Co. *v.* Callahan, 56 Ga. 331. But *contra*, Allen *v.* Brazier, 2 Bail. 293.

of proportion to the actual damage, they are not allowed. Thus where damages for delay in finishing a house, the rental value of which was $25 a month, were stipulated at $150 a week, this was not allowed as liquidated damages.(a)

In accordance with the general principle, where in case of the non-delivery of negroes at a certain time damages were to be paid at a stipulated rate per year, they were allowed at that rate.(b) A carrier agreed to deliver goods at a certain time, or to deduct a stipulated amount from the freight for every day's delay. This deduction was allowed.(c) It was provided in a lease that the lessee, on failure to surrender the premises at the end of the term, should pay double rent. This was allowed as liquidated damages.(d) In case of an agreement to furnish goods at a certain time, or to pay a stipulated amount per day as damages for failure, the stipulated amount is enforced as liquidated damages.(e) Ordinary clauses for demurrage in charter-parties are governed by the same general rule.

§ 420. **Stipulations to evade the usury laws.**—* *If the sum be evidently fixed to evade the usury laws or any other statutory provisions, the courts will relieve by treating it as a penalty.*(f) So, in a case,[1] where a bond was

[1] Orr *v.* Churchill, 1 H. Black. 227, 232.

(a) Clements *v.* Schuylkill R. E. S. R.R. Co., 132 Pa. 445.

(b) Tardeveau *v.* Smith, Hardin 175.

(c) Harmony *v.* Bingham, 12 N. Y. 99.

(d) Walker *v.* Engler, 30 Mo. 130.

(e) Bergheim *v.* Blaenavon Iron & Steel Co., L. R. 10 Q. B. 319; Young *v.* White, 5 Watts 460.

(f) Clark *v.* Kay, 26 Ga. 403; Brown *v.* Maulsby, 17 Ind. 10; Kurtz *v.* Sponable, 6 Kas. 395; Davis *v.* Freeman, 10 Mich. 188; State *v.* Taylor, 10 Oh. 378; Shelton *v.* Gill, 11 Oh. 417. In Illinois, an agreement in a promissory note made in good faith, without design to evade the usury laws, in case the note is not paid at maturity, to pay thereafter, by way of penalty, a rate

given that if certain bills were not accepted, the obligors would pay the amount of them, with interest at ten per cent., by way of penalty, it was insisted that the damages were liquidated. But Lord Loughborough said: "There can only be an agreement for liquidated damages where there is an engagement for the *performance of certain acts* the not doing of which would be injurious to one of the parties, or to guard *against the performance of acts* which if done would also be injurious. But in cases like the present, the law, having by positive rules fixed the rate of interest, has bounded the measure of damages." And it was held that the amount of the bills, with legal interest only, could be recovered. And, in a similar case, this language was held by the Supreme Court of New York: "Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such case. If they were, they might afford a sure protection for usury, and countenance oppression under the form of law."[1] **

Probably, in some cases, agreements open to this objection would be wholly void. This depends upon the local statutes with regard to usury. It will be observed that whenever an agreement for stipulated damages is treated as a cover for usury, and therefore converted into a penalty, this is put on the ground of the violation of the statute law. The *intention* of the parties in cases of this sort may be, either to liquidate damages, or to evade the statute. If it is the latter case, the agreement is a

[1] Gray *v.* Crosby, 18 Johns. 219, 226. In Galsworthy *v.* Strutt, 1 Exch. 659, 665, Parke, B., is reported to have said, with, perhaps, less than his usual care and discrimination: "I take it that it would be competent for the parties to make a stipulation to pay a certain sum on the non-performance of a covenant to pay a smaller sum; but they must do so in express terms; and if that be done, I do not see how the courts can avoid giving effect to such a contract."

exceeding the legal rate until paid, is not usurious. Lawrence *v.* Cowles, 13 Ill. 577; Gould *v.* The Bishop Hill Colony, 35 Ill. 324.

nullity, as contrary to express law; if the former, intention is not allowed to prevail. In a Kansas case of the sort under consideration it was held that it must affirmatively appear that the stipulation was not an evasion of the usury law; and in case of doubt the stipulation would not be allowed.(a)

§ 421. **Alternative contracts—Rule of least beneficial alternative.**—In dealing with such contracts as provide for performance in the alternative, as, for instance, a contract to do a certain act or pay a certain sum of money, there is at the outset an important question of interpretation. The intention of the parties may have been really to give an option to the defendant. This is a true alternative contract. The rule in that case, as will be seen, is that the plaintiff recovers compensation for the less valuable alternative, on the supposition that had the defendant performed, he would have taken upon himself the discharge of the least onerous obligation.

A simple case will show the complicated character of the questions that may arise. J. S., an owner of horses, contracts to deliver, after a race, his horse A. or his horse B., both being entered for the race; he clearly has his election to deliver either. Looking at the contract at the time of its being entered into, it is impossible to say which is the least beneficial alternative. After the race, if A. makes better time than B., it will probably be for the owner's interest to deliver B.; and on a breach, the measure of damages will be the value of B., and *vice versa*. If the owner enters his horse A., and the contract be to deliver A. or pay a sum of money, the rule of the least beneficial alternative, in the event of A.'s winning the race, may make the measure of damages the loss

(a) Foote *v.* Sprague, 13 Kas. 155.

arising from the non-payment of the money; or, in other words, the money itself; but if A. lost the race, it might very likely be for the owner's interest to deliver him, rather than pay the money. If the rule as to the least beneficial alternative is applicable to cases of this kind, the measure of damages would, in such a case, be the value of A.

§ 422. **Deverill v. Burnell.**—This question was discussed by the English Court of Common Pleas; [a] and though the judges differed upon the interpretation of the contract, they seem to have agreed upon the distinction above set forth. Plaintiff gave defendant for collection drafts drawn against bills of lading, on an agreement that if the drafts should not be paid, the defendant should either return them or pay the amount of them. The jury found that the drafts were worthless. It was held by the majority of the judges that the measure of damages was the amount of the bills. Grove, J., put this on the ground that the contract was "not in the strictest sense an alternative promise," but "a promise that the defendant would return the bills,[b] and if he did not return them, he would pay the amount of them"; and Brett and Keating, JJ., seem to have taken the same view. Bovill, C. J., dissenting from this interpretation, said:

"The question, as it seems to me, turns entirely on the construction of the lauguage in which the contract is alleged in the declaration. If the contract as there stated is simply in the alternative to do one of two things, it would be satisfied by the performance of either, and the damages would be the loss occasioned by the non-performance of that alternative which would be least beneficial to the plaintiff. If the true construction be that of the two things to be done, one depended upon the non-performance of the other; that is, if the defendant did not

(a) Deverill *v.* Burnell, L. R. 8 C. P. 475.
(b) *i. e.*, Bills of exchange.

return the bills, then he should pay the amount of them, the damages would be the non-payment of that amount. The rule of law is clear that, in the case of alternative contracts, the person who has to perform the contract has the right to elect which branch of the alternative he will perform. On the other hand, it is equally clear, if the contract is to do a thing, and if not, to pay a sum of money, then the damages for not doing the thing are the sum of money."

And interpreting the contract as a simple alternative contract, he thought the measure of damages should be compensation for the less beneficial alternative, that is, for the non-delivery of the worthless drafts.

§ 423. **Ordinary rule.**—Generally, the courts have laid it down as a rule that when the alternative is to do some particular thing or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money.(a) So, where, in consideration of the conveyance of certain city lots for $21,000 *only*, the defendant covenanted that he would erect, on or before the 1st of May, 1836, within two years, two brick houses thereon, or in default thereof, pay $4,000 after the 1st of May, 1836, Bronson, J., said :[1]

"This does not belong to the class of cases in which the question of liquidated damages has usually arisen. It will be found in most, if not all of those cases, that there was an absolute agreement to do or not to do a particular act, followed by a stipulation in relation to the amount of damages in case of a breach. But here there is no absolute engagement to build the houses. It was optional with the defendant whether he would build them or not."

And mainly on the ground that the defendant had made his election not to build, but to pay, and that

[1] Bronson, J., in Pearson *v.* Williams, 24 Wend. 244 ; s. c. in error, 26 Wend. 630.

(a) Pennsylvania Ry. Co. *v.* Reichert, 58 Md. 261 ; Hodges *v.* King, 7 Met. 583 ; Slosson *v.* Beadle, 7 Johns. 72 ; Allen *v.* Brazier, 2 Bail. 293.

the court would not modify or reform the agreement between the parties, the sum of $4,000 was held to be the measure of damages.[1] That this rule, however, is not to be applied in every case, but depends to some extent upon the circumstances, is shown by the case of Kemp *v.* Knickerbocker Ice Co.,([a]) decided by the New York Court of Appeals. The defendant contracted to deliver to the plaintiff a certain amount of ice at a fixed price, and in case of breach to forfeit one dollar a ton. The amount to be furnished was disputed by the defendant, who delivered a less amount than the contract called for; the plaintiff then purchased more ice of the defendant at the market price, which exceeded the contract price by more than one dollar a ton. It was held that though the stipulated amount would ordinarily be allowed as liquidated damages, yet in this case the court should allow the plaintiff the whole excess he had been forced to pay to the defendant.

§ 424. **General conclusions as to alternative contracts.**— The whole subject seems to be involved in a good deal of difficulty. If we are to understand, that the question of liquidated damages is not involved at all, the cases must turn either on the rule of the least beneficial alternative or the still simpler rule laid down in Pearson *v.* Williams. But frequently a contract though expressed in the alternative must be designed as a liquidation of damages, and if the fundamental principle governing the whole subject is, that the court will only follow the expressed intention of the

[1] When this case came into the Court of Errors, Mr. Senator Ely moved to reverse the judgment, on the ground that the doctrine of liquidated damages ought never to apply to a case which admitted of partial performance, as here where the house might have been half built, but only where the contract must be wholly performed, or left wholly unperformed. It is plain that this consideration did not apply to this case. But there may be instances where the suggestion will be found not without weight.

([a]) 69 N. Y. 45.

parties to liquidate the damages, when this intention is not calculated to work injustice, or to substitute for the compensation, which the law regards as proper, an arbitrary and oppressive pecuniary fine, then the form which the agreement takes cannot be conclusive; and an alternative contract may obviously be as open to this objection as any other. It is said that in these cases the party has his election, and the law will hold him to it; but so, in any case, it may be said that a party has his election to perform his contract or to pay the sum fixed upon in case of breach; and it is clear that in every case in which an attempt is made to stipulate damages, the parties contemplate the alternative of performance or breach. Besides this, if the canon as to alternative contracts be invariable, all the safeguards contained in the other rules relating to liquidated damages, may be swept away by a mere change in the phraseology of the agreement, and the sum fixed as security for the performance of the same covenant, be treated as a penalty if it is found in a bond, but as conclusive if found in an alternative contract. In a case decided by the Supreme Court of North Carolina,[a] the plaintiff sued on a contract to pay $3,000 for a lease received from him, or return the lease within ninety days, and after proving its execution, rested. The defendant offered to prove that the lease was of little or no value, insisting that the sum mentioned in the instrument was a penalty. The evidence was rejected by the court, and the plaintiff recovered judgment for $3,000, with interest. On appeal it was held that there must be a new trial, on the ground that, "to consider the sum mentioned in the contract as liquidated damages, would be absurd and oppressive on the defendant." So, too, on a promise to return certain bonds or pay a price greatly

[a] Burrage *v.* Crump, 3 Jones L. 330.

in excess of their value, the Supreme Court of Tennessee held the sum to be a penalty.([a]) Bell *v.* Truit([b]) was an action on an alternative covenant contained in a lease of lands to be bored for oil, to commence operations within a fixed period or to pay to the lessor $25 per annum until the work should be commenced. On breach by lessee, this was held to be a penalty, and the plaintiff only allowed to recover nominal damages.

§ 425. **Stipulation of damages strictly construed.**—A stipulation for liquidated damages in a contract is to be strictly construed. The defendant contracted to deliver coal in monthly instalments, with an agreement to pay twenty-five cents a ton liquidated damages in case of failure to deliver the agreed amount; but instead thereof the plaintiff might demand the instalment deliverable one month at the next succeeding month. The defendant having failed to deliver the coal, the plaintiff demanded delivery the following month; but the defendant still failed to deliver it. It was held that the stipulation as to damages did not apply in case of the latter breach.([c])

In a building contract the damages for delay were fixed at a certain sum per day. Owing to the fault of the owner the beginning of the work was delayed, and the builder therefore absolved from completing his contract at the agreed time; but he committed a breach of the contract by delaying unreasonably after he had time to complete the work. The court, however, refused to allow the owner damages for delay at the stipulated rate, and damages were assessed in the usual way.([d])

§ 426. **Consequences of liquidating damages.**—The con-

([a]) Baird *v.* Tolliver, 6 Humph. 186.
([b]) 9 Bush 257.
([c]) Grand Tower Co. *v.* Phillips, 23 Wall. 471.
([d]) Hamilton *v.* Moore, 33 Up. Can. Q. B. 520.

sequences resulting from the construction of agreements, in this point of view, are complex and curious. On one hand, it may be in many cases desirable to get rid of the stipulated damages, and to require an examination into the real loss sustained. But, on the other, a specific performance may be desirable; and this, it was formerly thought, could not be allowed if the damages were stipulated. The court inquired simply whether the stipulated sum was clearly meant as a penalty. So,[1] where articles were executed for the purchase of an estate, with a provision that if either should break the agreement, he should pay £100, Lord Hardwicke treated this as a mere penalty, and decreed a specific performance.[2] ([a])

It is now settled, however, that specific performance may in a proper case be decreed, though the parties have agreed on a sum that a court of law would award as liquidated damages, if the plaintiff brought his action at law ([b]) "It is not consistent with the bond or with the intention of the parties that the obligor should be free if he paid the penalty of £1,000. He could not acquire the right to break the agreement by paying the penalty. The plaintiffs have an alternative remedy to enforce the agreement if they do not bring an action."([c])

[1] Howard *v.* Hopkyns, 2 Atkyns 371.

[2] But, on the other hand, where defendant had underlet a church lease to the complainant, with a covenant to renew under a penalty of £70, it was held in the Irish Exchequer, and on appeal by the House of Lords, that this was not a covenant to renew, but that the party was at liberty to renew or pay the penalty. Unless the agreement was in the alternative, the decision may perhaps be questioned. Magrane *v.* Archbold, 1 Dow 107.

([a]) The rule is still maintained in some jurisdictions. Hahn *v.* Concordia Society, 42 Md. 460; Nessle *v.* Reese, 29 How. Pr. 382.

([b]) Crane *v.* Peer, 43 N. J. Eq. 553.

([c]) Lindley, L. J., in National Provincial Bank of England *v.* Marshall, 40 Ch. Div. 112, 118. In using the word "penalty," the Lord Justice did not mean that the sum was not recognized as liquidated damages; all the judges agreed that the plaintiff might have recovered the stipulated amount if he had brought his action at law.

Another consequence flowing from the distinction between stipulated damages and a penalty, under the original English law of arrest, was that for the former the defendant might be held to bail, but not for the latter; and therefore an affidavit to hold to bail, which did not show what the agreement was, nor in what respects it was broken, but merely alleged an obligation to pay £50 in case of non-performance, and charged such non-performance, was held insufficient, and the defendant was released from custody.[1]

§ 427. Civil law.—* The French Code, like our law, enables the parties to liquidate the damages for the non-performance of the contract; and the tribunal cannot depart from the sum thus fixed.[2] **

[1] Wildey *v.* Thornton, 2 East. 409; Edwards *v.* Williams, 5 Taunt. 247.

[2] Lorsque la convention porte que celui qui manquera de l'exécuter paiera une certaine somme, à titre de dommages intérêts, il ne peut être alloué à l'autre partie une somme plus forte ni moindre. Code Civil, § 1152.

The commissioners charged with preparing the codes proposed to retain the former jurisprudence in this respect, which permitted the judge to moderate the penalty in behalf of the debtor, if it evidently exceeded the damage sustained, but gave him no power to augment it in favor of the creditor, although it might be far short of the injury suffered. These views were, however, overruled. Toullier, vol. vi, 812, des Obligations, ou Clauses Pénales; see Domat, part i, book 3, tit. v, sec. 2, § 15.

The rejected provision is, however, adopted in Louisiana. There the judge may modify the penalty if the obligation has been partly performed. Code, § 2127.

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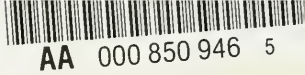
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